TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 601.

GEORGE S. HAWKE, PLAINTIFF IN ERROR,

vs.

HARVEY C. SMITH, AS SECRETARY OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED NOVEMBER 13, 1919.

(27,356)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1919.

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1 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribe- my name and affixed the Seal of the said Supreme Court of Ohio, in the City of Columbus, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

2 Supreme Court of Ohio.

No. 16477.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the United States and to the Associate Justices of the Court:

George S. Hawke, the plaintiff in the above entitled cause, shows by this petition to this honorable court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said George S. Hawke.

That, as appears in the record and proceedings there was drawn in question the validity of Article II, Section I, and Section 1*a* of the Ohio Constitution, providing for a proposed referendum election on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying the Woman Sufferage Amendment to the Federal Constitution, the question being whether or not said provisions of the Ohio Constitution are repugnant to the Constitution of the United States, and of the Articles of Compact of the Ordinance of 1787, and the decision is in favor of the validity of said sections of the Ohio Constitution, all of which fully appears

in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such court in such cases made and provided, and that the same be by this honorable court inspected and corrected in accordance with law and justice.

GEORGE S. HAWKE,
Attorney for Petitioner.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

3 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Assignment of Errors.

Assignment of Errors on Writ of Errors from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

Now comes George S. Hawke, in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled action, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Franklin County, Ohio, and in refusing to reverse said judgment and remand this cause to the Court of Appeals of Franklin County, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Franklin County, Ohio, erred in sustaining the demurrer of said Harvey C. Smith, Secretary of the State of Ohio, to the amended petition of said George S. Hawke.

Third. The judgment of said Supreme Court of Ohio was given for said Harvey C. Smith, Secretary of the State of Ohio, when it ought to be given for the said George S. Hawke.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this cause is in contravention of Article V of the Constitution of

the United States which provides that amendments to the Federal Constitution shall be valid to all intents and purposes when ratified by the legislatures of three-fourths of the several states. And that the new amendment to the Ohio Constitution relating to a
4 referendum of the electors on acts of the General Assembly in ratifying federal amendments ,is unconstitutional in that it conflicts with the United States Constitution, and is repugnant to the Constitution of the United States; and also violative of and repugnant to the provisions of Article 5 of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

5 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Entry.

Nov. 11, 1919.

On this day came the plaintiff in error, George S. Hawke, and presents to the Court his petition praying for the allowance of a Writ of Error from the Supreme Court of the United States, and filed therewith his assignments of error.

Which said writ of error is allowed and said plaintiff is ordered to give bond to cover the costs in this action in the amount of Two Hundred Dollars ($200.00).

I certify that a federal question was made in this case, viz: Whether a proposed referendum election under the Constitution of Ohio, Article II, Section 1 and Section 1-*a*, as amended in 1918, can be had on the action of the General Assembly of the State of Ohio in ratifying on June 16, 1919, the Woman Suffrage amendment to the Federal Constitution, under Article V of the United States Constitution, and whether said proposed referendum was violative and repugnant to the provisions of Article V, of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

HUGH L. NICHOLS,
Chief Justice, Supreme Court of Ohio.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

6 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Writ of Error and Order for Allowance of Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the President of the United States to the Honorable Judges of the Supreme Court of Ohio, Greetings:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you, or some of you, between George S. Hawke, plaintiff in error, and Harvey C. Smith, as Secretary of the State of Ohio, defendant in error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of Article II, Section I and Section 1*a* of the Ohio Constitution, providing for a proposed referendum election on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying the Woman Suffrage Amendment to the Federal Constitution, the question being whether or not said provisions of the Ohio Constitution are repugnant to the Constitution of the United States, and of the Articles of Compact in the Ordinance of 1787, and the decision is in favor of the validity of said sections of the Ohio Constitution, and whereas, there is manifest error in said judgment to the great damage of said George S. Hawke, and whereas we are willing if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington on the — day of November, 1919, in the said Supreme Court of the United States then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of November, 1919.

[Seal United States District Court, Sou. Dist., Ohio.]

B. E. DILLEY,
Clerk of the District Court of the United States, Southern District of Ohio.

Writ of error allowed upon the execution of a bond in the sum of $200.00 this 11th day of November, 1919.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

7 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Waiver of Citation.

The issuance and service of a citation is hereby waived this 11th day of November, 1919.

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for Defendant in Error.

(Endorsed:) Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

8 In Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio.

Præcipe.

Columbus, Ohio, Nov. 11, 1919.

To the Clerk:—

You are hereby directed to make a transcript of, and to certify and transmit the entire record in this cause, together with all pleadings and papers filed in this court, excepting the original petition and demurrer thereto, filed in the Common Pleas Court.

G. S. HAWKE,
Attorney for Plaintiff in Error.

[Endorsed:] Filed No. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

9 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Bond.

(Filed Nov. 11, 1919.)

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

Know all men by these presents:

That we, George S. Hawke, as Principal, and The National Surety Company, as Surety, are held and firmly bound unto Harvey C. Smith, Secretary of the State of Ohio, in the sum of $200.00 to be paid to the said obligee, and his successor in office; to the payment of which, well and truly to be made, we bind ourselves, our successors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of November, A. D. 1919.

Whereas, the above George S. Hawke, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio;

Now, Therefore, the condition of this obligation is such that if the above named George S. Hawke, shall prosecute his said writ of error and answer all costs and damages if he shall fail to make good his said plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGE S. HAWKE,
NATIONAL SURETY COMPANY,
A. W. GEISSINGER,
Res. Vice-Pres.
RALPH C. TREDWAY,
Res. Ass't Sec'y.

On this 11th day of November, 1919, the above bond having been presented to me for approval, and having examined the same and finding it in conformity to law and the orders of this Court, and sufficient in all respects, I hereby approve the same.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

10 Supreme Court of the State of Ohio, January Term, A. D. 1919.

No. 16447.

Title.

GEORGE S. HAWKE, Plaintiff in Error,
v.
HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Action: Error to the Court of Appeals of Franklin County.

Attorney for plaintiff in error: George S. Hawke, Cincinnati, Ohio.
Attorneys for defendant in error: John G. Price, Attorney General; B. W. Gearheart, Special Counsel, Columbus, Ohio.

(*Transcript of Docket Entries.*)

(Minute Book No. 35, page 247.)

1919.
Nov. 8. Petition in error and waiver of summons filed.
" " Court of Appeals transcript and original papers filed.
" 11 Judgment affirmed on authority of Hawke v. Smith, Secretary of State, No. 16349, decided September 30, 1919.

(Journal No. 28, page —.)

11 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Entry of Affirmance.

Nov. 11, 1919.

Error to the Court of Appeals of Franklin County.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, and was submitted by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be, and the same is hereby affirmed on authority of Hawke vs. Smith, Sec'y of State, Case No. 16349; Decided Sept. 30, 1919; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a special mandate be sent to the Common Pleas Court of Franklin County, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry."

12 In the Supreme Court of Ohio.

#16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Petition in Error.

(Filed Nov. 8, 1919.)

Plaintiff in error says that at the November term, 1919, of the Court of Appeals of Franklin County, Ohio, to-wit: on the first day of November, 1919, in a certain action then pending in said court wherein George S. Hawke was plaintiff in error and said Harvey C. Smith, as Secretary of the State of Ohio, was defendant in error, said

defendant in error, by the consideration of said Court of Appeals recovered a judgment against the plaintiff in error affirming a judgment theretofore recovered by said defendant in error against this plaintiff in error in a certain action then pending in the Court of Common Pleas of Franklin County, Ohio, wherein said plaintiff in error was plaintiff and defendant in error was defendant said judgment of said Court of Common Pleas, so affirmed by said Court of Appeals, being a judgment sustaining the demurrer of the said defendant in said court to the amended petition of plaintiff and dismissing said amended petition at plaintiff's cost. All of which will more fully and at large appear in the record of said action.

Plaintiff in error files herewith a duly certified transcript of the docket and journal entries in said case, together with all the original papers herein.

Plaintiff in error says that there is error in said record, judgment and proceedings of said Court of Appeals, manifest in the record of said court and to the prejudice of plaintiff in error in the following particulars, namely:

13 1. The said Court of Appeals erred in rendering judgment affirming the judgment, orders and proceedings of said Common Pleas Court of Franklin County, Ohio.

2. Said Court of Appeals erred in its findings and judgment that there was no error in the judgment and proceedings in said action in said Court of Common Pleas of Franklin County, Ohio, to the prejudice of this plaintiff in error

3. Said Court of Appeals erred in rendering judgment against this plaintiff in error affirming the judgment of the said Court of Common Pleas of Franklin County in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error and in dismissing the amended petition of plaintiff in error at his costs.

Plaintiff in error further says that this case involves questions arising under the Constitution of the United States and of the State of Ohio, namely: Article V of the Constitution of the United States, and Article II, Sections 1 and 1*a* of the Constitution of Ohio, and that it draws in question the validity of an authority exercised under the State of Ohio on the ground of such authority being repugnant to the Constitution of the United States, and also violative of and repugnant to the provisions of Article 5 of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

Wherefore, plaintiff in error prays that the findings and judgment of said Court of Appeals and Court of Common Pleas of Franklin County may be reversed, and that plaintiff in error may be restored to all things he has lost by reason thereof.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

14 *Waiver.*

Issuance and service of summons in error in the above action is hereby waived and the appearance of defendant in error entered. Dated this 8 day of November, 1919.

JOHN G. PRICE,
Att'y Gen.;

B. W. GEARHEART,
Special Counsel,
Att'ys for Defendant in Error.

15 *Transcript of Docket and Journal Entries—Supreme Court.*

STATE OF OHIO,
Franklin County, ss:

Court of Appeals.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

1919, October 29. Petition in Error filed—Issuance and service of summons waived and appearance of defendant entered,
" " 29. Transcript of docket and journal entries filed, (6) Original papers filed as follows, to-wit: Petition, amended petition, demurrer and memorandum, demurrer and memorandum to amended petition, summons and 1 entry,
" " 30. Judgment affirmed as per entry..... 2–71
" " 30. Mandate issued as per entry..... 3–631

16 In the Court of Appeals, Franklin County, Ohio.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Entry of Affirmance.

(Filed Oct. 30, 1919.)

This cause came on to be heard upon the petition in error, the transcript of the docket and journal entries, and the original papers and pleadings from the Court of Common Pleas of Franklin County, Ohio, and was by counsel submitted to the Court; on consideration whereof, the court finds there is no error on the record in said proceedings and judgment.

It is therefore considered by the Court that the judgment aforesaid be, and the same is hereby affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—. And the Court being of the opinion that there was reasonable ground for proceeding in error no penalty is allowed.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Franklin County, Ohio, for execution upon this judgment.

To which ruling and judgment of the court in affirming the aforesaid judgment of the Court of Common Pleas of Franklin County in sustaining said demurrer and dismissing said amended petition of the plaintiff in error at his costs, the plaintiff in error excepts.

17 THE STATE OF OHIO,
Franklin County, ss:

I, Guy R. Winegardner, Clerk of the Court of Appeals, in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said court in the above entitled cause, and I further certify, that the papers herewith sent, numbered from one up to — are all the original papers and pleadings filed in the above cause of George S. Hawke, plaintiff, against Harvey C. Smith, Secretary of the State of Ohio, defendant.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court of Appeals at the Court House, in Columbus, Ohio, on this 8th day of November, A. D. 1919.

[SEAL.] GUY R. WINEGARNER,
Clerk.

By A. EGOLD,
Deputy.

18 In the Court of Appeals, Franklin County, Ohio.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Petition in Error.

(Filed Oct. 29, 1919.)

Plaintiff in error says that at the October term, 1919, of the Court of Common Pleas of Franklin County, Ohio, to-wit: on the twenty-fifth day of October, 1919, defendant in error recovered a judgment by the consideration of said court, against plaintiff in error, in an action then pending therein, wherein plaintiff in error was plaintiff and defendant in error was defendant, a transcript of the docket and journal entries, together with the original papers in said action are filed herewith.

There is manifest error in said record and proceedings to the prejudice of plaintiff in error in this, to-wit: Said Court of Common Pleas erred in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error and in dismissing said amended petition of plaintiff in error at his costs.

Plaintiff in error therefore prays that said judgment of the Court of Common Pleas may be reversed and that he be restored to all things he has lost by reason thereof.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

Waiver and Entry of Appearance.

Issuance and service of summons in error is waived and appearance of defendant in error hereby entered this 29 day of October, 1919.

JOHN G. PRICE,
Att'y Gen.,

B. W. GEARHEART.
Attorneys for Defendant in Error.

19 *Transcript of Docket and Journal Entries—Court of Appeals.*

STATE OF OHIO,
Franklin County, ss:

Common Pleas Court.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

1919, October	9.	Petition, affidavit and precipe filed.
" "	9.	Summons issued Sheriff Franklin County, Ohio, returnable October 20. Answer Nov. 8, 1919.
" "	15.	Demurrer and memorandum filed.
" "	20.	Amended petition filed.
" "	23.	Demurrer to amended petition filed.
" "	25.	Demurrer sustained. Exceptions. Cause dismissed and at plaintiff's costs. Exceptions, as per entry.

198-611.

20 In the Court of Common Pleas of Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Entry.

(Filed Oct. 25, 1919.)

This day this cause coming on for hearing and it appearing to the court that pending the hearing of the demurrer to the original petition plaintiff filed his amended petition and the defendant has demurred thereto, and by agreement of the parties said cause is now submitted upon the said demurrer to said amended petition;

The court, coming on to consider said demurrer and being fully advised, does find that the same is well taken and should be sustained, to which finding and ruling the plaintiff excepts; and thereupon, the plaintiff not desiring to plead further,

It is ordered and adjudged that said cause be dismissed and that defendant recover from plaintiff his costs herein, taxed at $—, to which order and judgment the plaintiff excepts.

21 THE STATE OF OHIO,
Franklin County, ss:

I, Guy R. Winegardner, Clerk of the Common Pleas Court, in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said court in the above entitled cause, and I further certify, that the papers herewith sent, numbered from one up to — are all the original papers and pleadings filed in the above cause of George S. Hawke, plaintiff, against Harvey C. Smith, Secretary of the State of Ohio, defendant.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Common Pleas Court, at the Court House, in Columbus, Ohio, on this 27th day of October, A. D. 1919.

[SEAL.] GUY R. WINEGARNER,
Clerk,

By A. EGOLD,
Deputy.

22 Court of Common Pleas, Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Amended Petition.

(Filed Oct. 20, 1919.)

Plaintiff is a citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton he brings this action on behalf of himself and other- similarly situated. The defendant is the duly elected, qualified and acting Secretary of the State of Ohio.

Plaintiff says that on September 13, 1919, there was filed with the defendant, as Secretary of the State of Ohio, a referendum petition purporting to be signed by electors of Ohio, in the following words:

"To the Secretary of State of Ohio:

We, the undersigned, electors of the State of Ohio and of the County above named, respectfully order that House Joint Resolution No. 70, the full text of which is hereinafter set forth, adopted by the General Assembly of Ohio June 16, 1919, ratifying a proposed amendment to the Constitution of the United States of America providing what is generally known as Woman Suffrage in the United States and the several states, shall be submitted to the electors of

the State of Ohio, for their approval or rejection, at the next succeeding regular or general election occur-ing subsequent to sixty days after the filing of this petition."

The full text of the House Joint Resolution No. 70 is as follows:

Joint Resolution

Ratifying the proposed amendment to the Constitution of the United States entitled: Proposing an amendment to the Constitution extending the right of Suffrage to women."

Whereas, Both houses of the sixty-sixth Congress of the United States of America, at the first session of such Congress, by a constitutional majority of two-thirds of each house, made a proposition to amend the constitution of the United States of America in the following words, to-wit:

Sixty-sixth Congress of the United States of America at the First Session.

23 Begun and held at the City of Washington on Monday, the nineteenth day of May, one thousand nine hundred and nineteen.

Joint Resolution

Proposing An Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein):

That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states.

'Article —.

'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.'

'Congress shall have power to enforce this article by appropriate legislation.'

Therefore, be it Resolved by the General Assembly of the State of Ohio:

That the said proposed amendment to the Constitution of the United States of America be, and the same is hereby ratified; and be it further

Resolved, That the Secretary of the State of Ohio be, and he is

hereby directed, to furnish the governor of the state a certified copy of this resolution, as soon as the same has been filed in the office of such secretary of state, to be by the governor forwarded to the secretary of state of the United States as evidence of such ratification."

Plaintiff says that on June 16th, 1919, the foregoing House Joint Resolution No. 79, known as the Woman Suffrage amendment, was adopted by the 83rd General Assembly of Ohio, and was filed in the office of the Secretary of State on June 18, 1919.

That said referendum petition purports to be filed under the provisions of the Constitution of Ohio adopted at the General Election in November, 1918, as follows: (Sec. 1 and 1*a* of Art. 2.)

"Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.

"No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided for a referendum on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification, by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the
24 General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

Plaintiff says that said recently enacted provision of the Ohio Constitution is unconstitutional in that it is in conflict with the Constitution of the United States which provides in Article 5 the manner in which amendments may be made to the Federal Constitution as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any Manner

affect the first and fourth clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Plaintiff says that the Constitution of Ohio can not impose any limitation upon the ratification of amendments to the Constitution of the United States.

Plaintiff says that the said referendum petition now on file with the defendant is void and of no effect and can not submit any question to be decided by the electors of Ohio at the general election to be held in November, 1920.

Plaintiff says that the defendant will unless restrained by this Court, proceed to spend large sums of money out of the public funds of the State of Ohio in preparing and having printed form of ballots for the submission of said proposal to the electors at the general election to be held in November, 1920, and in preparing, having printed and mailed to the electors of the State, arguments for and against said proposal; which said expenditure will be a waste and misuse of the public funds of the State because said election cannot decide anything upon a proposal which cannot be legally submitted and which, if carried, would be without effect.

Plaintiff says that the provisions of the Constitution of the State of Ohio for a referendum are repugnant to the provisions of the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

That the provisions of the constitution of the State of Ohio for a referendum are repugnant to and violate the right to a republican form of Government which is imposed under the provisions of Article V of the Article of Compact embodied in the provisions of the said Ordinance of 1787.

That the referendum provided by the Constitution of the State of Ohio is in contravention of a republican form of government in that government by the people directly is the attribute of a pure democracy and is subversive to the principles and provisions of the said Ordinance of 1787.

That the provisions of said Ordinance of 1787 presupposes in each state to be formed in said northwest territory the maintenance of a republican form of government and the existence of state legislatures, to-wit:—representative assemblies having the power to make the laws; and that in each state the powers of government will be divided into three departments; a legislative, an executive and a judiciary. One of these, the legislative department, is destroyed by the provisions of the Ohio Constitution for a referendum.

That the provisions of the Ohio constitution for direct legislation, providing for a referendum violates the provisions of the Deed of Cession of 1784 from the State of Virginia to the United States of the said northwest territory.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Vir-

ginia Act of Ratification of 1788 ratifying the Act of Congress in accepting the cession to said territory.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Enabling Act of Congress authorizing Ohio to elect representatives to form a constitution or frame a government, which provides for a republican form of government, and one not repugnant to the provisions of the Ordinance of 1787.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of our form of government as provided for in said Enabling Act and accepted by the people of the State of Ohio as contained in the preamble to the Ohio Constitution of 1802.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Act of Congress of 1803 recognizing Ohio as a State and ratifying the adoption of the constitution and form of government provided for in the preamble of the Constitution of Ohio of 1802.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum, are violative of the provisions of the Articles of Compact contained in the said Ordinance of 1787 in that the same have not been accepted by the United States and have not been ratified by the Congress of the United States, and, therefore, have not been adopted by the common consent provided in Section 14 of said Ordinance of 1787.

Plaintiff says that he has no adequate remedy at law.

Wherefore, Plaintiff prays that the defendant, Harvey C. Smith, as Secretary of the State of Ohio, be enjoined from spending any money out of the public funds of the State of Ohio in preparing and having printed forms of ballot for the submission of the said referendum on said act of said General Assembly, and from spending any money out of the public funds of the State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal; and from submitting said proposal to the electors at the election to be held in November, 1920, and for such other relief as may be proper.

26 STATE OF OHIO,
County of Hamilton, ss:

George S. Hawke being first duly sworn, says that he is the above named plaintiff and that the facts stated in his foregoing amended petition are true.

GEORGE S. HAWKE.

Subscribed and sworn to before me this 18th day of October, 1919.

[NOTARIAL SEAL.] C. B. SMITH,
Notary Public, Hamilton Co., O.

27 In the Court of Common Pleas of Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Demurrer to Amended Petition.

(Filed Oct. 23, 1919.)

The defendant demurs to the amended petition herein, upon the following grounds:

(1) The facts alleged in said petition are not sufficient to constitute a cause of action.

(2) The court has no jurisdiction of the subject matter.

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for the Defendant.

Memorandum.

Plaintiff, since defendant filed his demurrer to the original petition, has amended and made the additional claim that the referendum provision in question contravenes the provision of the ordinance of 1787. We might say that this same question was made by a brief filed by J. C. Nicholson, Esq., in the case of Hawke vs. Smith, No. 79495, when it was pending in the Supreme Court. That
28 court, therefore, had before it the question which the plaintiff now makes and must have decided it adversely to his contention.

We further refer to the short memorandum furnished with our first demurrer.

Respectfully submitted,

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for the Defendant.

29 *Certificate of Lodgment.*

SUPREME COURT, STATE OF OHIO, *ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on the 11th day of November, 1919, in the case of George S. Hawke, plaintiff in error, against Harvey C. Smith, Secretary of the State of Ohio, defendant in error—

1. The original bond, a copy of which is herein set forth.

2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

30 Supreme Court of the State of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio,
Defendant in Error.

Authentication of Record.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, waiver of citation and precipe are the original papers filed in this court in the above entitled cause; that the copy of the bond hereto attached is a true copy of the bond filed in said cause; that the typewritten copies of pleadings and transcripts from the Court of Appeals and Common Pleas Court are true copies of the original pleadings and transcripts filed in said cause and that the foregoing constitutes a true and complete transcript of the record in said cause; that the foregoing transcript of docket and journal entries is truly taken and

correctly copied from the records of said Court; and that no opinion was rendered by the court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

Endorsed on cover: File No. 27,356. Ohio Supreme Court. Term No. 601. George S. Hawke, plaintiff in error, vs. Harvey C. Smith, as Secretary of the State of Ohio. Filed November 13th, 1919. File No. 27,356.

JAN 19 1920
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1919.

No. 601.

George S. Hawke, Plaintiff in Error,
vs.
Harvey C. Smith, Secretary of State of Ohio.

In Error to the Supreme Court of Ohio.

MOTION TO ADVANCE.

The plaintiff in error and the defendant in error join in this motion to advance for early hearing the above entitled case, which is in all respect similar to case No. 582, except that it involves the proposed Equal Suffrage Amendment of the Constitution of the United States. It is requested that the two cases be heard together.

Respectfully submitted,
John G. Price, Attorney General of Ohio,
B. W. Gearheart, Special Counsel,
Lawrence Maxwell, Of Counsel,
Counsel for Defendant in Error.

The plaintiff in error concurs and joins in the motion.

J. Frank Hanly,
George S. Hawke,
Arthur Hellen,
Counsel for Plaintiff in Error.

MAR 18 1920
JAMES D. MAHER,
CLERK.

No. 601. **OCTOBER TERM, 1919.**

IN THE

Supreme Court of the United States

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PLAINTIFF IN ERROR.

SHIPPEN LEWIS,
WILLIAM DRAPER LEWIS,
GEORGE WHARTON PEPPER,
Amici Curiae.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 602.

George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, as Secretary of the State of Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PLAINTIFF IN ERROR.

We appear in this proceeding as counsel for the National Woman's Party, a large organization of women from many parts of the country

whose purpose is to secure nation-wide woman suffrage by means of an amendment to the Constitution of the United States.

We ask leave to file this brief as *amici curiae* because a correct determination of the question involved is of great importance to the public in general and to our clients in particular. Until this Court shall decide that question a period of uncertainty will always attend the supposed adoption of an amendment to the Constitution of the United States.

The legislature of Ohio has unconditionally ratified the Nineteenth Amendment to the Federal Constitution. In accordance with the direction of the legislature, the Secretary of State of Ohio has certified the fact of ratification to the Secretary of State of the United States. Thereafter there has been filed with the Secretary of State of Ohio a petition asking for the submission of the legislature's action to a popular referendum. Such a referendum is expressly provided for by the Ohio State Constitution. The appellant has prayed for an injunction to restrain the spending of public money in holding the proposed election on the ground that the election can produce no legal effect because of the provisions of Article V of the Constitution of the United States. The Supreme Court of Ohio has refused the prayer and the case is now before this Court on writ of error.

Before considering the case upon the merits it is necessary to discuss the question of jurisdiction, and this question resolves itself into two

inquiries: (1) Is the subject-matter of the controversy justiciable? and (2) If it is justiciable, has this Court jurisdiction?

A. QUESTION OF JURISDICTION.

1

The Question here Presented is Justiciable.

It may be argued that the question here presented is not judicial but political in character; that it is for the legislative or executive branch of the Government to determine as a political question whether or not a state has ratified a federal amendment; or in the alternative that it is for each state to determine as a political question whether or not it has ratified a federal amendment.

This is a serious argument and deserving of the most careful consideration.

It will be well in the first place to distinguish the case at bar in this respect from those cases in which this Court has declared the guarantee to each state of a republican form of government to be a guarantee enforceable by the executive and not by the judiciary. In those cases the ultimate question presented is this: Is the *de facto* government of a given state a real government, or are all its supposed acts, executive, legislative and judicial, in fact utterly void?

In such cases as Luther *vs.* Borden, 7 How. 1, and Pacific States Telephone & Telegraph

Company *vs.* Oregon, 223 U. S. 118, this Court has declared that question to be political and not judicial. And such a decision was necessary, because to hold otherwise would lead to this conclusion: That the Court could, by declaring that no lawful State government existed, create a condition of anarchy and chaos which it had no machinery to cure. By deciding that the question of the existence or non-existence of a lawful state government was a question for Congress and the President, the Court placed the responsibility of decision upon those departments of the government which were competent to meet the practical results consequent upon that decision.

If in the case at bar the question were presented whether or not the legislative body which ratified this amendment was in fact the legislature of Ohio that would be a political and not a justiciable question. But there is here no dispute as to that question. Admitting that the lawfully constituted legislature of Ohio has unconditionally ratified the Nineteenth Amendment, the Supreme Court of Ohio has declared that this unconditional ratification may be subjected to the operation of a referendum. Thus the question presented to this Court is not of the existence or non-existence of any government or department of a government. It is simply the question of the construction of certain words in the Constitution, as applied to the exercise of a federal function by a department of a state government whose lawful existence no one disputes.

There is a further distinction between this case

and such cases as Luther *vs.* Borden and the Pacific Telephone case. There the Court refused to interfere with the domestic concerns of a state and held that only Congress or the executive was privileged to interfere in order to maintain a republican form of government and in order to overcome domestic violence. The Constitution carefully avoids the prescription of any machinery of state government, except in so far as such machinery may be necessary to discharge federal functions expressly imposed by the Constitution itself. For this reason the Court will not and cannot undertake to require what the Constitution does not require.

But in the instant case, the question is not as to the machinery of state government; it is as to the method by which a state may participate in the discharge of a federal function. By assuming jurisdiction this Court will not interfere with the domestic concerns of a state; it will merely decide for the United States as a whole whether or not the thing done by a state legislature in response to a proposal by Congress amounts to a ratification of a federal amendment under the provisions of Article V of the Constitution of the United States.

To decide that the question at issue is a political and not a judicial question is to leave its determination either to Congress, or to the President or to the several States. If it be for Congress to determine whether the constitutional method of ratification has been followed, then Congress can at any time amend the Constitution by de-

claring that three-fourths of the states have ratified a proposed amendment, irrespective of whether any state has in fact ratified. If it be for the President, he may in like manner amend the Constitution without the consent of any state. If it be for the states, then each state may substitute its own method of ratification for that provided in Article V, without the possibility of any revision of such action.

The Supreme Court of the United States is the only body which can on the one hand prevent the Constitution from being amended at the will of the Federal Government and on the other hand prevent each state from abandoning the method of amendment required by Article V. The responsibility thus imposed upon the Court is admittedly heavy, but it is no heavier than the responsibility necessarily assumed in passing upon the validity of a state statute, and it is not different in kind from that responsibility.

With respect to the justiciable character of the question presented, this case is similar to McPherson *vs.* Blacker, 146 U. S. 1, and Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565. In each of those cases the Court took jurisdiction, although in each there was an argument for declaring the question political rather than judicial identical with the argument which may be presented in the case at bar.

In McPherson *vs.* Blacker, the Republican nominees for presidential electors prayed the Supreme Court of Michigan to declare void an act of the legislature providing for the election of

presidential electors by districts and to direct its mandamus to issue to the Secretary of State of Michigan commanding him to notify the sheriff of each county, in accordance with the provisions of a prior act, that at the next general election there would be chosen a single group of electors for the whole State.

The Supreme Court of Michigan denied the mandamus. Upon writ of error to this Court it was argued by the defendant in error that the subject-matter of the controversy was non-justiciable because the decision of the Court would be subject to review by political officers and agencies. It was pointed out that the determination as to who was elected to the office of elector rested in the first instance with the board of state canvassers, in the next instance with the legislature in joint convention, in the third instance with the governor, and in the last instance with both houses of Congress. In none of these four instances could the action taken be subject to judicial review.

Mr. Chief Justice Fuller disposed of this argument in these words (page 23):—

> "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the Court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint

convention, and the governor, or, finally, the Congress.

"But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained. Boyd *vs.* Thayer, 143 U. S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman *vs.* Greenhow, 102 U. S. 672.

"As we concur with the State Court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitively disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the State Court.

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

The justiciable character of the question here in controversy is much more evident than in McPherson *vs.* Blacker. There the final determination of the matter lay with political agencies by necessary implication from the language of the Constitution. Here there is nothing in the Con-

stitution to indicate that either Congress or the executive is to have a voice in determining whether a Federal amendment has or has not been ratified.

In Ohio *ex rel* Davis *vs.* Hildebrant, an elector of Ohio prayed for a mandamus commanding the state election officers to disregard a negative referendum vote upon a redistricting act and to discharge their duties in accordance with the statute which had been so disapproved by the people. The Supreme Court of Ohio denied the mandamus. Upon writ of error to this Court, it was argued that the act in question was contrary to Article I, Section 4, of the Constitution, which provides:—

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing senators."

Here again there was a stronger argument against the justiciable character of the controversy than is presented in the case at bar, because the final decision as to the elections, returns and qualifications of members of Congress is by Article I, Section 5, of the Constitution, laid entirely upon Congress. The Court might conceivably have taken the position that it could not interfere to compel or prevent an election, because the validity of an election could be settled only by Congress after it had been held.

But the Court considered the case on the merits as one which presented a judicial question and decided that Article I, Section 4, of the Constitution and the Act of Congress passed in pursuance thereof did allow for the operation of a state referendum.

2

THIS COURT HAS JURISDICTION.

It cannot be doubted that there is a federal question here which gives this Court jurisdiction. The appellant is a citizen and taxpayer of Ohio and he seeks to restrain the spending of public money in holding a proposed election for the ratification or rejection by the people of the action of the state legislature on the ground that such an election can have no effect on account of Article V of the Constitution of the United States, which he alleges makes the action of the legislature final. The State Supreme Court impliedly recognized the right of the plaintiff under the laws of Ohio to obtain the relief requested but dismissed the bill solely upon the ground that there was no conflict between the State Constitution and Article V of the Federal Constitution. There was no opinion, but reference was made (Transcript, page 8), to the opinion in Hawke *vs.* Smith (Transcript in that case, page 10), a case which is here argued with the instant case and is docketed as No. 582, October Term, 1919.

The case therefore falls exactly within the language of Section 237 of the judicial code,

which gives this Court jurisdiction to review "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of * * * an authority exercised under the United States and the decision is against their (its) validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity." The appellant under the clauses quoted from the judiciary act is a proper person to draw in question the validity of the authority exercised under the United States by the legislature of Ohio and the validity of the state constitutional provision. It is not necessary for him to show that he claims directly any right, title, privilege or immunity under the Federal Constitution, laws or treaty, in order to bring this case within the jurisdiction of this Court.

In McPherson *vs.* Blacker, 146 U. S. 1, this exact question was raised and decided. In that case the appellants were the nominees of the Republican State Convention of Michigan for presidential electors and as such had demanded of the Secretary of State of Michigan that he send notices to the sheriff of each county in accordance with a law of the state providing for the election of presidential electors at large. The Secretary of State refused to comply with their demand on the ground that the election would be

conducted in accordance with the later act of 1891, which provided for the election of presidential electors by districts and in effect repealed the earlier act. The appellants filed a petition for mandamus in the State Court asking that the act of 1891 be declared unconstitutional as repugnant to Article II, Section 2, of the Federal Constitution.

The Supreme Court of the State took jurisdiction, considered the federal questions raised and decided that the act of 1891 was valid and on that ground denied the writ. Upon error to this Court it was argued that since the appellants claimed no right, title, privilege, or immunity under the Federal Constitution or laws and since their right to a mandamus depended solely upon local law the Court had no jurisdiction. This contention however was not adopted, but the Court took jurisdiction and through Mr. Chief Justice Fuller said:—

> "The Supreme Court of Michigan held in effect that if the act in question were invalid the proper remedy has been sought. In other words, if the Court had been of opinion that the act was void, the writ of mandamus would have been awarded."

In State of Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, Davis, as a citizen and elector of Ohio, filed a petition for a writ of mandamus against the Secretary of State to compel him to comply with an act of the legislature which provided for redistricting the state for congressional

elections. The act in question, though enacted by the legislature, had been rejected on a referendum election. It was contended that under Article I, Section 4, of the Constitution of the United States, the act of the legislature in such cases was not subject to referendum. The State Court considered the federal question and denied the mandamus. On appeal to this Court the federal question was considered, though neither Davis nor the State of Ohio claimed any right, title, privilege or immunity under federal law.

It is, of course, a possible view that the federal question clearly disclosed by this record will not be considered until after the popular vote and after a majority of electors shall have voted against ratification and, even then, only in case ratification by three-fourths of the states depends upon the action of Ohio. In that double contingency a question would be certain to arise directly involving the right of a woman to vote for presidential electors in Ohio or elsewhere and the ultimate decision of her right to vote would rest with this Court.

But if this Court could decide the question then on the ground that it is essentially a federal question, it may take jurisdiction and decide it now. The question is no less a federal question because it arises by anticipation rather than after the event. As a matter of equity jurisdiction it is indeed true that a chancellor will not usually decide abstract questions before they arise; but not only is this a matter in which this Court will probably

defer to the Supreme Court of Ohio but here there is a special and compelling reason for settling a great question of government before the situation has grown more complicated than it is already. If the people of Ohio are permitted to vote, and if they vote against ratification, a subsequent decision by this Court that the action of the General Assembly had been final would necessarily array the federal judiciary against the expressed will of the people. This is a contingency well worth guarding against. While the judiciary should hesitate to interfere with the holding of an election by the executive department of a government when the worst that could happen is that the election might prove futile, there should be no hesitation to decide upon the legality of any election in advance if by so doing an unseemly conflict can be avoided between departments of the same government or between the people of a state and the judiciary of the nation.

At the date of the writing of this brief the legislatures of thirty-two states, four less than the number required for adoption, have ratified the Nineteenth Amendment. In at least five of these, in addition to Ohio, there are referendum provisions. The right of women to vote will very probably be claimed at the coming spring primaries or at the presidential election in November. If, when the right is claimed, there are still six states whose referendum provisions make its existence doubtful, a situation will arise in which great uncertainty will exist as to a matter of

grave national importance. The decision of this Court in the case at bar is the only sure way to prevent such a situation from arising.

B. ARGUMENT ON THE MERITS.

We turn now to a consideration of the merits of the case, which must be determined by the following language of Article V of the Constitution of the United States:—

> "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

By this article Congress and Congress alone, is permitted to choose between two possible methods of ratification, one by the legislatures of three-fourths of the several states and the other by conventions in three-fourths thereof. In the case at bar it has chosen the first of these two

methods. There is no doubt but that the people of the State of Ohio intend to control the ratifying power of their legislature by subjecting the exercise of that power to the operation of a referendum.

Can the will of the people of Ohio be effectuated?

If it cannot, it is because the Constitution of the United States requires each state to create certain machinery in order to exercise its right to participate in the adoption of amendments, and does not permit the states to control the operation of that machinery after it has been created.

It is our contention that the states are put in this position by the provisions of Article V of the Constitution.

To answer completely the questions involved in this contention it is necessary to consider:—

1. What the word "legislatures" in Article V is intended to mean.

2. Whether Ohio has a legislature within this meaning.

3. Whether that legislature has ratified the Nineteenth Amendment to the Constitution of the United States.

4. Whether the State of Ohio can restrict the power of ratification.

We approach these questions in the order indicated.

I.

"Legislatures" in Article V means representative legislative assemblies.

It is contended by those who support the validity of a referendum that "legislatures" is equivalent to "those bodies in whom the legislative power is vested." We contend that the internal evidence of the whole Constitution indicates that "legislatures" was intended to mean and can mean only representative legislative assemblies.

The word "legislature" is used in the Constitution not loosely, but with discrimination. In the original document and in the first twelve amendments it occurs ten times outside of Article V and on each occasion applies only to a representative legislative body. In six of these cases there has been, and can be, no argument on the matter whatever; unless the word has its primary, popular and technical meaning it has no meaning at all:—

(1) Article I, Section 2. The qualifications of electors of Congressmen shall be those "requisite for electors of the *most numerous branch of the state legislature.*"

(2) Article I, Section 3. Senators from each state shall be "*chosen by the legislature thereof.*"

It was universally admitted that it was necessary to amend the Constitution in order to elect

senators by popular vote. No one, so far as we are aware, seriously suggested that a state constitution could compass the same end by subordinating the action of the legislature to the direct action of the voters.

(3) and (4) Article I, Section 3. In the same section the governor of a state is given power to fill a senatorial vacancy "*during the recess of the legislature*," by a temporary appointment "*until the next meeting of the legislature*."

(5) Article IV, Section 4. The United States shall protect every state against domestic violence "*on application of the legislature, or of the executive (when the legislature cannot be convened)*."

(6) Article VI. "*The members of the several state legislatures*" shall be bound by oath or affirmation to support this constitution.

In addition to these, there are four other instances in which the original instrument refers to the state "legislatures." In two of these four, the meaning of the word has not received judicial construction:—

(7) Article I, Section 8. Congress shall exercise exclusive jurisdiction "over all places purchased *by the consent of the legislature of the state in which the same shall be*."

(8) Article IV, Section 3. No new states shall be carved out of old states "*without the consent of the legislatures of the states concerned*."

Two of this group of four instances have caused litigation in this Court involving a question closely related to the question in the case at bar:—

(9) Article I, Section 4. "The times, places and manner of holding elections for senators and representatives, shall be *prescribed in each state by the legislature thereof;* but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

In Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, this Court assumed that until Congress provided otherwise only a representative legislative assembly could prescribe the times, places and manners of holding the elections indicated.

(10) Article II, Section 1, Clause 2. "Each state shall appoint, *in such manner as the legislature thereof may direct*, a number of electors * * *."

In McPherson *vs.* Blacker, 146 U. S. 1, this Court assumed that in this clause "legislature" had its usual meaning and declared that the powers of the representative assembly could not be circumscribed by the state.

All through the Constitution the word "legislature" is carefully used, and bears the meaning which is both popular and technically correct. The framers of the Constitution and of the early amendments were perfectly familiar with the term "legislative powers" and used it accurately in Article I, Section 1. It cannot be supposed that they confounded it with the word "legislature."

So, when power was intended to be reposed in the whole people of a state, and not simply in its legislature, apt words are invariably used for that purpose. Thus:—

Members of the national house of representatives shall be chosen "*by the people of the several states*," (while senators were to be chosen in each state, "by the legislature thereof)." (Article I, Section 2.)

The appointment of officers and the authority of training the militia is reserved "*to the states respectively*." (Article I, Section 8.)

"The migration or importation of such persons as *any of the states* now existing shall think proper to admit, shall not be prohibited by the Congress" before 1808. (Article I, Section 9.) This subjected the power of Congress not simply to the will of the state legislatures, but to the will of the states, however expressed, according to their several constitutions.

No state, without its consent, shall be deprived of its equal suffrage in the Senate. (Article V.)

"The powers not delegated to the United States by the Constitution, nor *prohibited by it to the states, are reserved to the states respectively, or to the people*." (Amendment, Article X.)

So also the executive authority of a state is carefully distinguished from the legislature and from the people as a whole.

"When vacancies happen in the representation from any state, *the executive authority* thereof

shall issue writs of election to fill such vacancies." (Article I, Section 2.)

When vacancies occur in a state's representation in the Senate, "during the *recess of the legislature of* any state, *the executive thereof* may make temporary appointments. (Article I, Section 3.)

A demand for the extradition of a fugitive from justice is to be made by "*the executive authority* of the state from which he fled." (Article IV, Section 2.)

And the use of constitutional conventions was expressly provided for both in Article V, dealing with amendments, and in Article VII, dealing with the ratification of the Constitution.

It appears therefore from a study of the Constitution itself that the people of a state, its executive, its legislature, and its constitutional conventions are carefully kept distinct, so that there is no possible ground for alleging that the word "legislature" was ever intended to include anything but a representative legislative body.

In the recently adopted Sixteenth Amendment the respective functions of the legislature, of the executive and of the people are set apart, and there is drawn between the legislature and the people that clear line of distinction which the appellees would have this Court erase.

When vacancies happen in a state's representation in the Senate, "the *legislature* of any *state* may empower the *executive* thereof to make temporary appointments until the *people* fill the

vacancies by election as the legislature may direct." (Article I, Section 3, paragraph 2, as amended.)

The soundness of the proposition that a legislature means of necessity a representative legislative assembly has been tested by the suggestion that if this be true it must follow that a state which abolished its representative body and legislated by initiative only, would thereby lose the power to participate in the ratification of federal amendments if the method of ratification by legislatures were selected by Congress.

Such a conclusion is logically correct and entirely sound. If a state should abolish its legislature and cease to have any representative legislative body, it would lose its ability to ratify a federal amendment where Congress chose the legislative method of ratification. A state so acting would do so with full knowledge of the consequences.

It would also lose its representatives in Congress, since there would no longer be any qualifications "requisite for electors of the most numerous branch of the state legislature." (Article I, Section 2, and Article I, Section 3, as amended.) This would be unfortunate, but still a voluntary surrender of rights.

The Federal Constitution will have to be amended before a state can abolish its legislature and still preserve its right to representation in Congress and its right to ratify an amendment submitted by Congress to the legislatures of the several states.

2

Ohio Has a Legislature Within the Accepted Meaning of that Word.

The Constitution of Ohio entrusts the legislative power of the state to the General Assembly in these words:—

> "The legislative power of the State shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided." (Article II, Section 1.)

In the provision of the Constitution of Ohio with respect to federal amendments the same distinction is preserved between the general assemby and the people. The separate existence of the representative legislative body is recognized but it is attempted to circumscribe its power by means of the referendum.

Had the Constitution of Ohio created a legislative body composed partly of the people and partly of an elected assembly there might be some doubt as to whether the state had anybody capable of participating in the ratification of a federal amendment by legislatures. But there is no such composite body in Ohio. The legislative power is vested in the general assembly in the first instance. It can only be exercised by the

people if a measure which has been proposed to the general assembly by initiative shall fail of passage by that body. The distinction between the general assembly and the people is clearly preserved, and the general assembly exactly fits that meaning of the word "legislature" which the framers of the Constitution intended.

3

THE LEGISLATURE OF OHIO HAS RATIFIED.

No one contends that the legislature of Ohio has not ratified. The Secretary of State of Ohio has certified this fact to the Secretary of State of the United States, and its truth is not open to dispute. It is contended not that ratification has not taken place, but that the State of Ohio may suspend and ultimately destroy the effect of the ratification through the operation of a referendum.

4

THE STATE OF OHIO CANNOT RESTRICT THE POWER OF ITS LEGISLATURE WITH RESPECT TO THE RATIFICATION OF FEDERAL AMENDMENTS.

It is contended by the defendant in error that since the Constitution merely provides for ratification by the legislatures of three-fourths of the several states, and does not provide for the manner of such ratification, each state may limit its own legislature in any way whatever; that the legislature, in ratifying, acts only as a state agency

and is therefore wholly subject to the power of the state; and consequently that a state may subject the act of its legislature to the operation of a popular referendum.

Whether a legislature, in ratifying a federal amendment, is bound to conform to the rules of procedure laid down by the state constitution may be a debatable question. But the question here is not a question of procedure. The Constitution of Ohio attempts to add another ratifying body to that designated by the Constitution of the United States. It says in effect: "Under certain circumstances no amendment to the Constitution of the United States shall be considered to be ratified by the legislature unless and until it shall also be ratified by the people at the polls." This is an attempt not simply to regulate the procedure to be followed by the legislature, but to limit the substantive power of the legislature by requiring the consent of another body to make effective the expressed consent of the legislature.

We submit that the state cannot impose such a limitation even upon its own legislature. To permit it would be to allow the state, rather than Congress, to choose the method of ratification to be pursued, although the Constitution gives the power of choice to Congress alone. For if a state can annex a popular referendum to the method of ratification by the legislature it can go further and annex a constitutional convention. It can provide that no resolution of the legislature shall operate to ratify a federal amendment unless and until such resolution shall be approved by a

state constitutional convention. Plainly this would vest the power of the choice of methods in the state rather than in Congress.

In two cases this Court has considered the right of a state to limit the power of its legislature with respect to the discharge of functions expressly imposed by the Constitution of the United States.

In McPherson *vs.* Blacker, 146 U. S. 1, there was considered the validity of a Michigan statute which provided for the election of presidential electors by districts instead of at large. It was contended that the statute was contrary to the provisions of Article II, Section 1, clause 2, of the Federal Constitution, which provide that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors," &c. The question was whether the state must "appoint" as a whole or whether it could act through several political agencies. The plaintiff in error argued (page 11), that appointment by the state meant, on its face, appointment by the state as a whole and that the power given to the legislature to determine how the state should appoint did not allow the legislature to deprive the state of all appointing power.

Mr. Chief Justice Fuller, in the opinion which supported the constitutionality of the statute, said (page 25):—

> "The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would

> seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of these words, *while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself."

In other words, the only purpose of inserting the words "in such manner as the legislature thereof may direct" was to prevent the state from circumscribing the power of its legislature.

In Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, this Court considered the validity of a state referendum upon an act of the Ohio legislature changing congressional districts. It was contended that such a referendum was precluded by Article I, Section 4, of the Constitution, which reads:—

> "The times, places and manner of holding elections for senators and representatives, shall be *prescribed in each state by the legislature thereof;* but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Congress, by an act of February 7th, 1891, had continued existing districts in a state "until the legislature of such state in the manner herein prescribed shall redistrict such state." In other words, Congress had waived its power of regulation and had left that power with the state legis-

latures. But in 1911 Congress asserted its power of regulation, deprived the state legislatures of their exclusive control and provided that a state might be redistricted "in the manner provided by the laws thereof," thus delegating the power of Congress to the entire law-making authority of each state. Mr. Chief Justice White shows in his opinion (pages 568-569), that this was done for the express purpose of admitting the application of a state referendum.

When a redistricting act of the Ohio legislature was submitted to a referendum and defeated, it became necessary for this Court to decide whether the referendum was permissible under Article I, Section 4, of the Constitution of the United States. It was declared permissible on the express ground that Congress had made it so by the later act of 1911. This Court said (page 568):—

> "So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the states through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state

> legislative power for the purpose of creating congressional districts by law."

Here the Court recognized that the state could not impose upon its legislature the limitation of a referendum when the legislature was performing a duty laid upon it by the Constitution of the United States. The referendum became admissible only when Congress exercised its power under the second clause of Article I, Section 4.

When the Supreme Court of Wisconsin in 1910 sustained that state's senatorial primary law, it was upon the express ground that a legislator, in voting for a United States senator, could not be legally bound to follow the result of the primary election. (State *ex rel* Van Alstine *vs.* Frear, 142 Wis. 320.) Speaking of Article I, Section 3, of the Federal Constitution, the Court said:—

> "The Constitution unequivocally vests in the legislatures of the several states the power to elect senators. This can only mean that it is made the duty of the legislators to meet, consult, and exercise their conscientious judgments in making a choice, having in mind always that they are the agents and representatives of those who sent them and that the wishes of the people are entitled to grave consideration. But if it be the object and purpose of this law to shift the burden of, and the responsibility for, the election of United States senators from the legislature to the electorate: if our legislators are to play the parts of automatons and become mere passive instruments by and through

> whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primaries, as the members of our electoral college confirm the result of a presidential election; if the electors in reality elect United States senators, instead of the legislature, then the constitutional scheme has been superseded and the spirit of the Constitution has been evaded and disregarded. Performing the empty ceremony of recording the wish of some other body is vitally different from expressing and recording independent thought and judgment" (page 346).
>
> * * * * * * *
>
> "Construing the law as imposing no legal obligation on the part of any member of the legislature to vote for his party nominee at the primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed" (page 351).

The ratification of a federal amendment is a process entirely *sui generis*. In its inception, Congress acts alone, without the approval of the President. (Hollingsworth *vs.* Virginia, 3 Dall. 378.) In its completion it is universally understood that the state legislatures can act alone without the approval of their respective governors.

An examination of the original documents shows that at least seven of the legislatures which ratified the first ten amendments did so without the subsequent approval of their respective govern-

ors. Of the thirty legislatures which ratified the Fifteenth Amendment, at least fourteen did so without the subsequent approval of their respective governors.

Whether a state constitution could validly require the governor's signature to make effective the legislature's ratification of a federal amendment is a question similar to that under discussion in the case at bar, though not identical with it. Like the question now at issue it has never been decided, since no state has expressly required the approval of its governor to validate such a ratification.

The constitution of Missouri forbids the legislature to ratify an amendment to the Constitution of the United States which may impair the right of local self-government, and the constitutions of Florida and Tennessee forbid a legislature to act upon a proposed amendment unless elected after the submission of the amendment to the states. But the validity of these provisions has never been tested, so far as we are aware.

An examination of the proclamation of the Secretary of State certifying to the adoption of the Fourteenth Amendment shows that ratification by the legislatures of twenty-eight states was requisite. The concurrent resolution of Congress directing the promulgation of this proclamation recites ratification by the legislatures of twenty-nine states, two of whom had attempted to rescind their action. To make up the number of twenty-eight, it was necessary to disregard this attempted rescission. (See Cur-

tis' Constitutional History of the United States, page 658.) The necessary inference is that at least in the opinion of Congress and the Executive the ratification of a Federal amendment is not, like a statute, subject to repeal.

In a word, constitution-making is not legislation and does not follow the ordinary course of legislation.

A study of Madison's Journal and of Elliott's Debates shows that the Convention of 1787 considered carefully the method by which the new constitution should be submitted to the people. Arguments were presented in favor of submission to the legislatures and in favor of submission to conventions elected by the people. The latter was recognized as the method more likely to evoke a direct expression of the popular will, and its advocates prevailed. This appears clearly from the quotations in the able brief of counsel for the plaintiff in error.

There are no recorded debates upon the language of Article V, but it is evident that the choice between the two methods of ratification given to Congress was a compromise between the respective advocates of the two methods of submission to the States. Iredell explained the matter to the constitutional convention of North Carolina in these words:—

> "By referring this business to the legislatures, expense would be saved, and, in general, it may be presumed they would speak the genuine sense of the people. It may, however, on some occasions, be better to con-

sult an immediate delegation for that special purpose. This is, therefore, left discretionary."

To permit a referendum upon the ratification by the legislature of a federal amendment is to substitute the choice of the state as to method for the choice of Congress, in spite of the intention of those who framed and adopted the Constitution.

Respectfully submitted,

SHIPPEN LEWIS,
WILLIAM DRAPER LEWIS,
GEORGE WHARTON PEPPER.

Office Supreme Court, U. S.
FILED
FEB 25 1920
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

No. 601.

George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, Secretary of State of Ohio.

Error to the Supreme Court of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

This case differs from No. 582, only in that it involves a referendum of the action of the General Assembly of Ohio ratifying an amendment to the Constitution of the United States proposed by the Sixty-sixth Congress extending the right of suffrage to women (R. 14, 15).

It is not thought necessary to add anything to the argument in No. 582, and it is therefore respectfully submitted upon our brief in that case that the judgment of the Supreme Court of Ohio in this case should be affirmed.

John G. Price,
Attorney-General of Ohio,
B. W. Gearheart,
Counsel for Defendant in Error.

Judson Harmon,
Lawrence Maxwell,
Of Counsel.

Office Supreme Court, U. S.
FILED
APR 22 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

NO. 601

GEORGE S. HAWKE,
Plaintiff in Error,

v.

HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(27356)

Decisions of State Courts in Referendum Cases.

1. Washington.
2. Ohio.
3. Oregon.
4. Maine.
5. Colorado.
6. Arkansas.
7. California.
8. Michigan.

Submitted by Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1919.

GEORGE S. HAWKE,
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v.
HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

No. 601.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

IN EXPLANATION.

For the information and convenience of the Court the Plaintiff in Error submits unofficial, but what is believed to be correct, copies of the decisions of the Supreme Courts of the several states on the question of the validity of a state constitutional provision for a referendum on the act of ratification by a state legislature of an amendment to the Federal Constitution.

1. The opinions rendered by the Supreme Courts of the States of Washington and Ohio affirming the validity of the referendum clauses in the constitutions of said states, together with the dissenting opinions filed in the causes in which said decisions were rendered.

2. Unofficial, but what is believed to be correct, copies of the opinions of the Supreme Courts of Oregon, Maine,

Colorado, Arkansas, California and Michigan holding state constitutional referendum provisions void as applied to the acts of their respective legislatures ratifying the Eighteenth Amendment to the Federal Constitution.

I.

OPINION OF THE SUPREME COURT OF WASHINGTON.

IN RE STATE OF WASHINGTON ON THE RELATION OF FRANK P. MULLEN, RELATOR, V. I. M. HOWELL, SECRETARY OF STATE OF THE STATE OF WASHINGTON, RESPONDENT, No. 15313.

Chadwick, C. J., concurred in by Justices Mount, Main and Holcomb:

At the general election held in 1912 the people of the State of Washington adopted as a principle of government the power to initiate laws and to review at the bar of popular opinion all acts, bills or laws passed by the legislature of the State of Washington.

The right so to do is emphasized as a power reserved and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights or limit or extend their political liberties, for they wrote an exception, saying that a referendum may be ordered in all cases, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. The writing of an exception specifying the things not reserved is an expression within sound rules of construction of a reservation to pass upon all things not so specified.

The court, in passing directly upon the amendment, and in other cases arising under city charters, has held firm to the principle of the referendum and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Stats. of U. S., Sixty-Fifth Congress, Sess. 11, Ch. 212, 1918, p. 1050) to the federal constitution providing that:

> Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

It will be noted that the amendment does not pertain to matters within the original concept of the Constitution, to the definition or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative and which have hitherto been a subject of legislation by the several states under the police power. We understand that the federal government has no power to control the police power of the states except as such power may have been expressly granted, or as it may be necessary to maintain the acknowledged powers of the federal government.

This amendment was submitted to and ratified by the legislature of the State of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent Secretary of State; he asked that it be filed and a ballot title be supplied. Respondent refused to receive it upon the grounds (a) that the amendment having been adopted by a joint resolution and not by an act, bill or law it was not within the terms of the seventh amendment, and (b) that it was not a subject for referendum under Article V of the Constitution of the United States.

Addressing ourselves to the first contention of the respondent, is the resolution an act, bill or law within the meaning of those terms as employed in our constitution; whether the people intended an act, bill or law to be statutes enacted by the legislature, or whether they meant action by the legislature which affected them as law?

No cases have been cited, and we may confidently say that there is none holding to a rule of strict construction where the power of the whole people is in question It is a rule become axiomatic by long continued reiteration that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction, that is to say the power of the legislative body ,or the people if exercising that function, will not be abridged by the courts or suffered to be abridged by others if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. To this end the courts of the country have so addressed themselves that without resort to the tedium of limitless authority we may well adopt the language of Judge Cooley, who was an acknowledged master in the

field of constitutional law; that constitutional provisions must be interpreted with reference to—

> The times and circumstances under which the State Constitution was formed—the general spirit of the time and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. *People v. Harding,* 53 Mich. 481.
>
> The safe way is to read its (the Constitution's) language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. *Maxwell v. Dow,* 176 U. S. 581, 602.
>
> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look to the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. *Bulger v. Kansas,* 123 U. S. 623, 661.

The people, too, have directly charged us with a duty to be mindful of their sovereign rights:

> A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government. Art. 1, sec. 32, Const. State of Washington.

Wherefore the purpose of the people in adopting the seventh amendment is a proper subject to be considered.

Did they intend to grant any exceptions other than those enumerated in the seventh amendment? If this were an ordinary case of statutory construction we have no doubt that we could all agree that we would look first to the old law, the mischief and the remedy. It is more important in considering a question involving the first of all the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern—that we should measure the power reserved by the former condition.

It is well known that the power of the referendum was asserted not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will. They endeavored to, and did,—unless we attach ourselves to words and words alone, reject the idea upon which the referendum is founded and blind ourselves to the great political movement that culminated in the seventh amendment, make reservation of the power to refer every act of the legislature with only certain enumerated exceptions.

Guided by these considerations we are satisfied that the people used the words, "act, bill or law" in no restricted sense but in a sense commensurate with the political evil they sought to cure.

And why should not the amendment be a law within the meaning of the seventh amendment?. No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue and be within sound rules that if the people had so intended they would not have used the word "law" at all, as was done in the State of Oregon. We can conceive of no more sweeping law than

the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders *pro tanto* the sovereignty of the State, gives to the federal government a right to enact laws and to enforce them through the federal courts and it will deny the citizen the protection of some of those guarantees that we have written out of the travail of time into our own Bill of Rights. Upon construction we hold that the amendment to the Constitution of the United States is a law within the meaning of the seventh amendment, and is subject to referendum.

But it is contended that, whereas the legislature ratified the amendment by joint resolution instead of by act or bill as it might have done, the resolution being not *eo nomine* an act, bill or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology and so insistent upon "scholastic interpretation" as to admit this premise we must hold that the legislature had no power to ratify the amendment except by act or bill, for we find no power granted in the constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd; either, the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided, or, if sustained, would permit the legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case if the argument of the learned Attorney General is to be sustained. But we are not put to the extremity of holding that the legislature may not in matters of ratification act

by resolution, for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment and affect the people in their civil and political rights, cannot be referred arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the *act* of the legislature in adopting it that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished. It is true that we have no provision in our constitution providing for the passage of resolutions even in the formal matters in which the legislature has through out the entire history of our territory and state been wont to act, but it is just as evident that there is no limitation upon the power of the legislature to act by resolution.

The constitutions of some of the states and the Constitution of the United States (section 7, article 1) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held if the constitution is silent, as ours is, that legislation cannot be effected by that method.

Rogers v. Crane, 1 W. Va. 176;

State ex rel. Atty. Gen'l. v. Kinney, 56 Ohio St. 721;

Barry v. Viall, 12 R. I. 18.

And were we considering a matter involving private right arising in or out of the laws of this state we could not question the authorities just cited, but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the Constitution of the United States does not rise in or out of the constitu-

tion of the states but arises out of the federal constitution, and any act, whether it be by resolution or by bill, on the part of the state legislature must be held to be sufficient expression of the legislative will unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the Supreme Court of the United States has held that the question whether the referendum does violence to the Constitution of the United States is non-justiciable, holding that the question whether it deprives the government of a state of its representative character, thus violating the guarantee of a republican form of government, is a question for Congress, and not for the courts. The power to question the manner of adoption being in Congress, and not in the courts, the contention that the legislature had no power to act by resolution is non-justiciable, but this holding does not foreclose an inquiry as to the legislative character of the thing done.

It may be that my argument is not entirely clear. If so, we may profitably resort to an illustration. The people of the State of Washington have by expression of their reserved right to legislate upon all proper subjects of legislation declared the policy of this state to be against the barter and sale of intoxicating liquor within the state, and by subsequent laws that we, as citizens of a sovereign state, are opposed to the use of intoxicating liquor by any of our citizens. The original law by its accretions has become what is popularly called in the nomenclature of the Anti-Saloon League "bone dry." This the people did of their own free will and accord and by the assertion of an hitherto unused power. Let the question occur, can their act be undone by any plan, power or authority, less or other, than the power that established the present

state of the law? Keeping in mind our present "bone dry" condition, or plight if that term be preferred, suppose the Congress of the United States should propose an amendment to the federal constitution providing that it shall hereafter be *lawful* to ship into and sell in all of the states of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied; then suppose that the state legislature did by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of states only, including our own, to meet the demands of the federal constitution. We would then have a law that was not a law before; that would wipe out *pro tanto* the present law; that would work such an exception to it that, so far as the policy of our citizens had been expressed by their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate—would it be urged for one moment that the people of this state could be denied a right of referendum to determine for themselves under their reserved powers whether they desired their own law to be thus overcome? Would they have to stand by helplessly while the fruits of their victory were swept away and their sovereignty surrendered in degree by resolution of the legislature?

I opine that we would find some way to declare that the right to refer the matter to the people who had theretofore exercised their reserved power upon the very subject of the proposed legislation could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies, and it is enough to say that the relator is

within the law as declared by the whole people and as such his right should not in conscience be denied. We cannot fit a rule to meet a particular case; it must apply to all alike whatever the cause and whatever the character of those who invoke it.

The final and, as we believe, the principal ground of opposition is that the amendment, being submitted under Article V of the Constitution of the United States, is a federal question in the sense that state laws and state constitutions have no bearing upon or relation to the issue.

It is argued that inasmuch as Article V of the Constitution of the United States provides that a proposed amendment "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the *Legislatures* of three-fourths of the several states, or by convention in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word "legislatures"; if that word and that alone is the Alpha and Omega of our inquiry, it follows that the controversy is at an end, but we are cited to no instances where a great question involving the political rights of a people have been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law.

In the Oklahoma Bank case (219 U. S. 104), Justice Holmes frowned upon a like invitation, saying:

> We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one

> or another of the great guarantees in the Bill of Rights. Judges should be slow to read into the latter (The Constitution of the United States) a *nolumus mutare* as against the law-making power.

It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendment. It is the act of ratification or rejection by the legislative power in a state and not the manner of doing that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress and the submission of amendments for ratification or rejection by the legislatures of the several states at all was a matter of grace upon the part of the whole people when the Constitution was adopted, but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had been provided or might thereafter provide, and, when so regarded, as a compact between the states and the federal government.

It is provided in the federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It can not be urged successfully that the framers of the Constitution used the words "legislatures" and "conventions" as terms describing then present institutions, for it is well known that at the time the Constitution was adopted some of the states did not have legislative assemblies.

Article V can mean no more than this; that no amendment shall be adopted unless it is sanctioned by the su-

preme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention or such other method as might thereafter be adopted by the people in the several states.

If we hold that the words "legislatures" and "conventions" do not control the plain purpose and spirit of Article V; that is, that the people shall pass upon a proposed amendment by their representatives if that be the plan provided by them at the time of its submission; or, if not, under such other plan of expressing their will as may not be offensive to the federal constitution, we are on solid ground. For the framers of the Constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form; they understood, as we sometimes forget, that—

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. Cooley on Constitutional Limitations, 6th edition, page 39.

Wherefore it may be said that it is the meaning and intent of Article V that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote under the referendum clause of a state constitution would be contrary to the provisions of Article V unless it can be said under sound rules of construction that the referendum is offensive to the Constitution of the United States.

The people of several of the states, having the sovereign right of self-government, excepting only as they may have yielded that right under the Constitution of the United

States and its amendments, have adopted the referendum as a rule of government and the only objection that has ever been urged, or that could have been urged against it, is that it violates section 4, Article IV, of the Constitution guaranteeing to every state a republican form of government. The Supreme Court of the United States has held that it does not so offend.

Pacific Telephone Co. v. Oregon, 223 U. S. 118.

The fault of disassociating a word or correlative words from the text of a written law and premising a judgment without the warmth of the spirit of that law may be illustrated. If we are wrong it may well be that a state might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the federal constitution. If the people of this state had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might have done), and had provided that all laws should thereafter be initiated by and voted upon by direct vote of the people, or that the legislative functions of the state should be exercised by a council of three and that all their acts should be subject to a referendum at the next succeeding general election, it would follow under the theory advanced to defeat a referendum in this case that a proposed amendment could not be either ratified or rejected in the State of Washington, for there would be no "legislature" or "convention" in the sense in which those terms are employed in the federal constitution.

Significance is placed on the word "conventions," it being contended that if the word "legislature" had been used alone our argument might seem plausible, but the added word "conventions" necessarily implies that Con-

gress had in mind a representative body and not legislative authority; but we are inclined to take a broader view.

It was doubtless intended that "legislatures" should mean one thing; that is, the legislative authority of the state; and "conventions" another thing, as an extraordinary representative body convened by and in the state for the sole purpose of passing upon the proposed amendment to the federal constitution. If it had no other intention in adopting the term "legislatures" in specifying one of the instrumentalities for passing upon the proposed amendment than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also if they so desire. Inasmuch as the Constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the national constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "legislatures" or conventions of three-fourths of the states than that. Certainly it was and is of no concern to the others what sort of legislature any particular state has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum, but we are not without competent authority to prove that the manner or the name attached to the legislative power of the state, whether it be a representative body or the people themselves, is of no concern to the federal government.

In *State ex rel. Schrader v. Polley*, 25 S. D. 5, it was contended, inasmuch as it was provided in the federal constitution (Sec. 4, Art. 1) that

> The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof,

that the relator was entitled to have his name go upon the ballot at a general election under an act of the legislature but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there the Constitution of the United States provided that the *legislature should prescribe the times, places and manner* of holding elections, while in the instant case the provision is that the amendment shall be ratified by the legislatures.

After noting the tenth amendment to the Constitution that—

> The powers not delegated to the United States, are reserved to the States respectively, or to the people,

which, by the way, is a declaration that the people of the several states may function their legislative power in their own way, especially so when the ninth amendment—

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people—

is regarded; for the right to legislate directly or by representative bodies is a right assuredly retained, and being retained may be exercised in the form and manner provided by the people of a state, the court says:

> We are also of the opinion that the word "Legislature," as used in section 4, art. 1, of the federal Constitution, does not mean simply the members who compose the Legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the federal Constitution refers to the "Legislature" in the sense of its being the legislative department of the state, whether it is denominated a Legislature, General Assembly, or by some other name. Under Sec. 1, Art. 3, of the state Constitution, it will be observed, the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum, upon any law passed by the Legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government or its existing state institutions." It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and

the Legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term "Legislature" has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic., Webster's Dic., 18 Am. & Eng. Ency. 822; 25 Cyc. 182), and which, in this state, under section 1, art. 3, Const. S. D., includes the people.

In *Baldwin v. Trowbridge*, 2 Bart. Contested El. Cas. 46, the minority report in presenting the legal side of the controversy shows the following pertinent language which meets with our approval: "But it was argued that this power was by express terms left, not to the states simply, but to the Legislatures thereof, and that this is such a limitation upon the people of the states that they have not power to restrict their Legislatures in the exercise of this right, conferred upon them by the federal Constitution; but I submit, with all due respect, that not only the history and object of the section under consideration, but the proper definition of the term "Legislature" as therein used, show the fallacy of this construction. The "Legislature" of the state, in its fullest and broadest sense, signifies that body in which all the legislative powers of a state reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the federal Constitution, or such as they themselves may provide by the organic law of the state."

The writ was denied.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, is likewise to the point. The general assembly, being the representative legislative body of the state of Ohio, passed an act on May 27, 1915, redistricting and apportioning the state into several congressional districts. The state had theretofore by an act, passed April 28, 1913, been districted and divided. A sufficient number of the people filed a petition for a referendum of the latter act. It was submitted to the electors of the state and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act and was not a subject of referendum because Section 4, Article 1, of the federal constitution provided that the times, places and manner of holding elections for members of Congress, "shall be prescribed in each state by the Legislature thereof." The court put the question:

> Does the term "legislature," as used in Article 1, Section 4, of the Federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including the power reserved to the people empowering them to "adopt or reject any law" passed by the general assembly under the provisions of Section 1, Article 11, of the Constitution of Ohio?

After reference to the state constitution, which is in form similar to the seventh amendment to our own, the court says:

> These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the Senate

and House of Representatives, the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the "referendum."

While Article 1, Section 4, of the United States Constitution, is controlling upon the states in so far as it grants the legislature of the state authority to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by Article X of said Constitution, "expressly reserved to the states respectively, or to the people."

Webster's New International Dictionary defines "legislature" as follows: "The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws."

The Century Dictionary defines the same term as follows: "Any body of persons authorized to make laws or rules for the community represented by them."

Under the reserved power committed to the people of the states by the federal constitution, the people, by their state organic law, unhindered by federal check or requirment, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment

of 1912, provided that the "legislative power" of the state should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The law-making body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term "legislature" necessarily implies a bicameral body. When the term was originally embraced in the constitution the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each, called an executive council. These states later abolished their councils and established a legislature consisting of two branches, and such is the charater generally of the various state legislature today. 1 Bryce's American Commonwealth, page 461, note.

The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote .

This case went to the Supreme Court of the United States (241 U. S. 565). That court passed the question of the power of the state to adopt and use the referendum as an instrument of

legislative will, "as obvious," holding that the state law which had been made subject to the referendum was valid and operative. A conclusion manifestly unsound if the word "legislature" means a bi-cameral body and that meaning is inflexible under the Constitution of the United States, for if that were so the states would have no power to prevail against it whatever the form of their expression may have been.

But it is said that the Supreme Court may be unsound in that respect, but is sound in result because the Congress had passed an act, ch. 537, Stat. 13, making the referendum a component part of the legislative authority empowered to deal with the election of members of Congress. There is nothing in the act of Congress which

> prevents the people of a State from reserving a right of approval or disapproval by referendum of a state act redistricting the state for the purpose of congressional elections. (Syllabus.)

But if it were so it would not avail respondent, for the power of the state to act comes from the Constitution and **not** from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the Constitution. Chief Jusice White disposed of the controversy when he defined the issue.

> The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the *legislative* authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress.

And said:

> The court below adversely disposed of these contentions and held that the provision

> as to referendum was a part of the legislative power of the State, * * * * . As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power, and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative is conclusively established to be wanting in merit.

It could not have been so held if the act of *legislature*, as distinguished from legislative authority, was essential under Section 4. If that were so the court must have denounced the referendum in that and all cases where the Constitution leaves a matter to the legislature and refused to follow the state court, for its first duty is to the Constitution.

Our attention is called to an unpublished decision of the Supreme Court of Oregon in *Herbring v. The Attorney General*. The premise of the decision is that the reserved power of the people is limited to a review of "any *act* of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the state constitution and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our constitution is more comprehensive. The decision does not appeal to us for another reason. Its basis is fundamentally unsound in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antece-

dent provisions of the state constitution, whereas the right comes from the Constitution of the United States.

Other questions were discussed by counsel. We have considered them and are agreed that they are not controlling.

The writ will issue.

Dissenting Opinion.

Parker, J., Justices Mitchell and Tolman concurring:

I am unable to concur in the majority opinion of the court. The necessity of a prompt disposition of this case, in view of the decision of a majority of the court to grant the writ prayed for, prevents me setting forth at the length I would like to my views upon the question presented. I will content myself with the following brief observations, which I think could be materially strengthened in support of the conclusions I have reached, by a more detailed discussion.

The resolution of congress here in question reads:

Joint Resolution.

> Proposing an amendment to the Constitution of the United States. 1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring there), that the following amendment to the constitution be, and hereby is, proposed to the States, to become valid as a part of the constitution when ratified by the legislatures of several states as provided by the Constitution:

Article.

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The constitution of the United States, in the fifth article thereof, prescribes the manner of proposing and ratifying amendments to that instrument as follows:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress.

In the Sixth Article of that instrument we also read:

> This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or

> which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

I am convinced that the ratification by a single state legislature of a proposed amendment to the federal constitution is an exercise of a power which the legislature possess by virtue of the fifth article of that instrument and the designation by congress of that method of ratification in pursuance of the power given to congress by that article, and that the legislature is not acting in pursuance of any power given to it by the state constitution, except in so far as the legislature may owe its existence to the state constitution. I cannot escape the conclusion that such act of ratification by the legislature is not law-making legislation for the state and its people under its constitution, but is simply the casting of the vote of the state and its people in the manner prescribed by the federal Constitution and the direction of congress made in pursuance thereof, as to whether or not the proposed amendment of that instrument shall be ratified. Such act of a state legislature, it may be conceded, is an act of participation in legislation; but I think it is an act of participation in purely national legislation, and is neither state legislation, nor an act of participation in state legislation. I may further observe that the act of ratification would, as I view it, be in substance identical in character, whether done by the legislature by a vote upon an informal motion, by a formal resolution, or by a formal bill, as in the enactment of ordinary state laws; and that the form of ratification by the legislature is of no moment in the determination of whether or not the legislative act

of ratification is referable to a direct vote of the people. Of course the legislature might call for an advisory vote of the people before finally acting, but that is not this case.

In Jameson Constitutional Conventions, (4th Ed.) Section 583, that learned author says:

> The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power which it could not assume under any notion of a general right to legislate, for that right is confined within state limits, and to the enactment of ordinary laws.

Our problem here is, what body of persons compose the legislature within the meaning of that word as used in the fifth article of the Federal Constitution rather than the question of where the whole of the state's legislative power resides. Recurring to the language of that article, and having in mind what must have been the commonly accepted meaning of the word "legislature" when originally placed in that article of the constitution, I am convinced that it means that body of persons composing the ordinary representative law-making body of the state. The fact that congress is given power to submit proposed constitutional amendments to conventions, manifestly meaning representative conventions, in the several states, as well as to the legislatures thereof; the manner in which the several states and their people express their choice for president and vice-president of the United States through chosen representatives called electors, instead of by direct vote; the manner in which the several states expressed their choice for United States senators through chosen members of their respective representative law-making bodies called "legislature," or some other name

of the same import, as provided by the federal constitution until recent years, the fact that the federal constitution, until the recent amendment thereto, providing for the election of senators by direct vote of the people, never contained any provision for the people of the respective states voicing their will by direct vote upon any Federal or National question wherein the decision of a state, or the people thereof as a whole, was called for under some provision of the Federal Constitution; and the history of the times touching the original framing and adoption of the Federal Constitution; to my mind argue all but conclusively that it was not the intent or purpose of the framers of that instrument that amendments thereto should be ratified by the several states or the people thereof, other than by an expression of their will in that behalf through their representative legislative bodies called "legislature" or some other name of the same import, or through representative conventions held in the several states for that purpose.

Counsel for the relator call to our attention and invoke in his behalf the decisions of the supreme court of South Dakota and Ohio, in *State ex rel. Schrader v. Polley, Secretary of State*, 26 S. D. 5, —— N. W. ——, and *State, ex rel, Davis v. Hildebrant, Secretary of State*, 94 O. St. 154, —— N. E. ——, holding, in substance that the word "legislature" as used in Section 4 of Article 1 of the Federal Constitution, means and comprehends the entire legislative power of the respective states, including not only the legislative power possessed by the representative legislative body of each state, but also the legislative power which may be reserved in the people of a state by its constitution, to be exercised by the initative and referen-

dum, as such power is reserved in the people of South Dakota and Ohio by their constitutions, in substance the same as such power is reserved in the people of our state by the above quoted portions of the seventh amendment to our constitution. Section 4 of Article 1 of the Federal Constitution, the interpretation of which was involved in these decisions, reads:

> The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators.

The question in each of these cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of Section 4, Article 1 of the Federal Constitution, and the provisions of Article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, com-

pleted or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been suggested that a state constitution might not create any representative law-making body such as is commonly called "legislature," but provide for the exercise of the whole of the state's legislative power by direct vote of the people, a thing I concede to be not impossible; and that such a state might decline to provide for the calling of a convention to act upon a proposal to amend the federal Constitution. I am quite unable to see, should my view of the question here presented prevail, that such a condition would in the least impair the right and power of congress to obtain in a norderly lawful way an expression of the will of the people of such a state touching a proposed amendment to the federal Constitution since congress is plainly given the power to submit such a proposal to conventions in the several states and to provide the manner of electing delegates to, and the calling of such conventions, all of which could be readily done by congress wholly apart from state constitutional and statutory law.

It is contended in behalf of the relator that the secre-

tary of state should not now be permitted to refuse to file the petition, give a serial number thereto as a referendum measure, transmit a copy thereof to the attorney general for the preparation of a ballot title and perform the other acts required of him by law looking to the submission of referendum measures to the people; and that we should not at this time entertain the defense made in the secretary's behalf that the proposed measure is not referable to the people. Counsel for the relator call to our attention and rely upon that line of decisions holding, in substance, that the courts will not entertain the question of the constitutionality or validity of a proposed initiative or referendum measure, in a proceeding to compel an officer to perform or refrain from performing some act prescribed by law, to be performed by him, looking to the submission of such measures to the people. Our real concern here is not with the constitutionality or validity of the joint reso lution of our legislature here in question. The real reason why the secretary of state should not be compelled to perform the acts demanded of him by the relator is, that the question of the ratification of a proposed federal constitutional amendment is not one to be finally decided by direct vote of the people of the several states, but by the vote of the states and the people thereof, expressed through their representative law-making bodies or representative conventions held in the several states for that purpose. No decision of any court has come to our notice holding that an officer whose duty it is to perform acts looking to the submission to the people of initiative and referendum measures can be compelled by mandamus to perform any act looking to the submission of a question to the people which under no circumstances is referable to a direct vote

of the people for final decision as an initiative or referendum measure. The demand here made by the relator upon the secretary of state is, in its last analysis, a demand that he perform an act which I think he is not legally required to perform. Our decisions in *State, ex rel. Case v. Howell, Secretary of State*, 85 Wash. 281, and *State ex rel. Case v. Howell*, 85 Wash. 294, are in harmony with this view of the law, though this exact question was not there presented to the court.

I am of the opinion that the writ should be denied.

II.

OPINION OF THE SUPREME COURT OF OHIO.

IN RE HAWKE V. SMITH, SECRETARY OF STATE, No. 16349.

Nichols, C. J., Justices Jones, Matthias, Johnson, Donahue and Wanamaker concurring; Justice Robinson dissenting:

In what sense did the makers of the Constitution of the United States use the words "ratification" and "legislatures" in Article 5, which provides for the ratification of proposed amendments to the Constitution by the legislatures of three-fourths of the several states? In the use of the term "ratification" was a legislative act contemplated?

In *State ex rel. Davis v. Hildebrant, Secy. of State, et al.*, 94 Ohio St. 154, 114 N. E. 55, the meaning of the term "legislature," as used in Section 4, Article 1, of the United States Constitution, was involved. That section reads:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

Here was a plain grant of power by the Federal Constitution to each of the states to pass laws on the subject referred to, subject to the reservation stated.

In the Hildebrant case we held that, in the exercise of this explicit power given by the Federal Constitution to each state to make the law referred to, the term "legislature" in Section 4, Article 1, of the United States Constitution "comprehends the entire legislative power of the state, and, as so used, includes not only the two branches of the General Assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article 2, of the Ohio Constitution."

We held further, in paragraph 3 of the syllabus:

> Under the latter clause of Section 4, Article I, of the United States Constitution, complete and plenary power over state legislation enacted thereunder rests in the federal Congress, and its laws supersede all state regulations upon the same subject. Under its grant of power to "make or alter such regulations," Congress did, by its apportionment act of August 8, 1911, legislate upon the subject, by recognizing as lawful such congressional districts as may be created in the manner provided by the laws of those states employing the constitutional referendum.

The case of *State ex rel. Davis v. Hildebrant, supra,* was affirmed by the Supreme Court of the United States, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. It will be

observed that in that case, the state, in passing the redistricting law, which applied to and governed the people of the state, was engaged in the performance of a state function. The state was given the power by Section 4, Article 1, of the Constitution of the United States, to legislate on the subject, and in the performance of that state function of legislation it was proper to invoke every part of the machinery which the state had provided for the making of its laws, and the Hildebrant case conclusively determines that the referendum, is an essential part of that machinery.

Now, in this case, a different article of the federal Constitution is involved. It does not involve the making of a state law to govern merely the people of a state, but it provides for the participation by the state in the making of an amendment to the national Constitution, a change in the federal law to govern all of the states. The method prescribed by Article 5 of the Federal Constitution by which the state participates in the making of an amendment to the federal fundamental law is by ratification by the "legislatures of three-fourths of the several states," etc.

In the Hildebrant case the amendment to the state Constitution, adopted in 1912, which provided for the referendum generally on legislation by the General Assembly, was involved. But in November, 1918, the people adopted an amendment to the state Constitution for the express purpose of providing for a referendum on amendments to the Federal Constitution proposed by Congress under Article 5. The pertinent part of that amendment (Sections 1 and 1a of Article 2) is as follows:

> The people also reserve to themselves the legislative power of the referendum on the

> action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.

It will be observed that this was adopted for the express purpose of allowing the people of the state to participate in the legislative acts of ratification of proposed amendments to the Federal Constitution. By this action the people provided for the inclusion of the popular will in the legislative power of ratifying any proposed amendment to the Constitution of the United States.

The functions conferred in different parts of the federal Constitution upon the legislatures of the states are manifestly dual in their nature. For example, in the election of United States Senators by the legislatures of the several states, as provided by the federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative, and in states in which the Governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the state in a manner similar to that in which the electoral college represents it in the choice of President. On the other hand, the power conferred upon the legislatures in Section 4, Article 1, of the Constitution of the United States, which confers power on the legislature of each state to prescribe the "times, places and manner of holding elections for Senators and Representatives," is purely legislative; and, as already pointed out, in the exercise of that power all the legislative machinery of the state was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under Article 5 the state participates in an act which amends the federal Constitution, and in that

sense performs a federal function. But it does not follow that by the word "legislature" in that section a *corpus designatum* is meant. It participates in the making of a fundamental law, and its act is legislative in character. The making of the Constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification the makers of the federal Constitution contemplated that all of the agencies provided by the state for legislation should be empowered to act in accordance with the provisions made by the state at the time the action on the ratification should be taken, and that the word "legislature" in Article 5 is used in that sense.

Judgment affirmed.

CONCURRING OPINION.

Wanamaker, J.:

The question in this case is not, should our state or nation be "wet" or "dry"? The question is not, Are you for or against the referendum in the making of state and national constitutions? The question is not, Are you for or against any particular amendment to the national Constitution, proposed or prospective? The question is, Can the referendum be used by the people of Ohio on any proposed amendment to the national Constitution when proposed by Congress and submitted to the states for ratification by "the legislatures" thereof? Is such a use of the Ohio referendum permitted, not by the Constitution of Ohio merely, for this is conceded, but by the Constitution of the nation, particularly Article 5?

A judge who would permit his personal preference on

the merits of any particular amendment to influence his judgment in deliberation upon and decision of such question, by so much as a pennyweight, not only disqualifies himself as a judge, but brings dishonor upon the judiciary.

I am for this judgment because the primary and paramount principle involved in it was unanimously approved by this court in 1916 by the judgment in the case of *State ex rel. Davis v. Hildebrant, Secy. of State, et al.*, 94 Ohio St. 154, 114 N. E. 55. This case was reviewed and unanimously approved by the United States Supreme Court within 60 days from the date of the judgment herein, as appears in 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. Now, what was the question in that case, and what was decided on that question?

The first paragraph of the syllabus of the Hildebrant case reads:

> The term "legislature," in Section 4, Article I, of the United States Constitution, comprehends the entire legislative power of the state; and, as so used includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article II, of the Ohio Constitution.

The Supreme Court of the United States, in its syllabus upon the same case, uses this language:

> Under the referendum amendment of 1912 to the Constitution of Ohio, the people of that state having disapproved of the state redistricting law passed after Congress had enacted the apportionment act of 1911, and the state court having held that under the referendum amendment the legislative power was reserved in the people to be expressed by referendum, held that:
>
> The decision of the highest court of the

> state that under such amendment the legislative power of the state is now vested not only in the general assembly, but also in the people by referendum, and that a law disapproved by the referendum was no law, is conclusive here.

It was admitted in open court by counsel upon both sides of the case at bar that, unless it was substantially distinguishable, essentially different in principle, from the Hildebrant case, the right of referendum would likewise apply to the proposed amendment to the national Constitution.

It is already apparent from the syllabi quoted that the language to be construed in the Hildebrant case was the words "the legislature thereof," as used in Section 4, Article 1, of the Constitution of the United States, which section, so far as pertinent here, reads:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof.

It is conceded that this section under consideration in the Hildebrant case is not the section involved in this case, and that what is involved here is Article 5, of the national Constitution, which so far as pertienent reads:

> The Congress * * * shall propose amendments to this Constitution * * * which * * * shall be valid * * * as part of this Constitution, when ratified by the legislatures of three-fourths of the several states.

Now, boiled down, the single question is: Did the Constitution makers intend to use the words "the legislature" differently in Article 1, paragraph 4, than they did in Article 5?

Those against the referendum claim an essential dif-

ference in the meaning of the words "the legislature" in Article 1 and Article 5. Those for the referendum insist that they are used essentially the same. Let us examine the articles respectively, with a view of determining what, if any, attributes or characteristics they have in common:

(1) Each article is a delegation of certain national power to "states," Article 1 for redistricting purposes, and Article 5 for ratification purposes.

(2) Each article before it may become effective requires proposals, or previous action, by the national law-making body, Congress.

(3) Each article, whether applied to redistricting or ratifying, affects national policies, the former oftimes swinging the balance of party power from one party to the other in the national Congress, thereby for a time at least changing the nation's policies, and the latter more permanently and potentially affecting policies.

(4) Each article recognizes the power involved as a law-making power having its origin in the national law-making body, and its consummation in the state law-making body.

Surely it will not be contended that the people of Ohio have failed to so declare and define their legislature in its powers touching the subject of lawmaking, either statutory or constitutional, as to be comprehensive enough to include a referendum on any proposed constitutional amendment.

The significant resemblances pointed out in the four foregoing items clearly and convincingly demonstrate that the national Constitution contemplated the words "the legislature" as meaning the same thing in Article 5 as in Article 1. The only difference mantainable touching the meaning of the words "the legislature" resides in the fact

that they appear in different articles. In all substantial and essential respects, the purpose, the power, the agency, and the achievement are the same. Too many legal distinctions, so called, exist in a persistent purpose to bring about a much desired decision rather than in any inherent differences of fundamental fact or primary principle.

It is urged that this construction of the words "the legislature" in reference to the states, destroys or devitalizes uniformity in ratification. But uniformity as to method of state government was neither designed nor desirable in the opinion of the fathers, but, upon the contrary, each state was presumed to deal with its own domestic affairs—that is, state affairs—in the manner best calculated to promote the safety and happiness of the people of that state, according to the judgment of the people of that state. In short, diversity of machinery for state government was then, as now, the prevailing rule, and the only uniformity contemplated by these amendments was that the lawmaking power, by whatever name known in the state, by whatever agency exercised in the state, should be the ratifying power in this case, as it was the redistricting power in the Hildebrant case.

It was further contended that a judgment in favor of the referendum in this case would elevate the state above the nation.

It must be remembered that we had state Constitutions before we had a national constitution, and that only by acting as states, through representatives and delegates, was the national Constitution adopted, first by the convention, and second by the states, and then it would not have been adopted by the states but for the overwhelming assurance that as soon as Congress would meet there

should be proposed and adopted, at the earliest practicable moment, a Bill of Rights safeguarding the rights of the states and the people. In this behalf it is significant to note Articles 9 and 10:

> Article 9:
>
> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Article 10:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

It must be remembered that in the early history of the nation, especially at the time of the making of the national Constitution, the doctrine of state's rights was in the ascendancy—that is, the states were exceedingly jealous of their rights and powers as states and were loath to surrender them—and therefore the imperative demand for the reservation of all powers not delegated by the Constitution. Surely one of the most important and significant of all those powers reserved was the right of each state to determine for itself its own political machinery and its own domestic policies, and it can scarcely be claimed that it is within the power of any court to nullify or in any wise alter the political machinery of a state, especially that which the state has designed and designated as its lawmaking machinery.

It is also contended that at the time the national Constitution was made the referendum could not possibly have been contemplated, for it was then as unknown as the automobile and the airplane.

Undoubtedly this contention is true, but what of it? It was sufficient for the national Constitution to designate

that the states must ratify and that they must ratify by legislatures or conventions, in this case by legislatures; and that each state has the sole and paramount right to determine what its legislature shall be cannot now be disputed.

It is a matter of common knowledge that there is too much petty continuous disturbance of state laws by the various general assemblies of the several states. Too many laws are enacted, amended, and repealed without rhyme or reason, and the people of the state in large numbers regret whenever they have a legislature upon their hands. Suppose some one were to propose and the people were to pass an amendment to the state Constitution providing for the abolition of the general assembly for a period of ten years, during which time all laws should be proposed and enacted by the people of the state through the initiative and referendum. If the contentions of those who are against the referendum were to prevail, during such period, the state would be powerless to either favor or reject a proposed amendment to the national Constitution, because it had no general assembly. Such an absurd situation disqualifying a state from passing upon proposed amendments to the national Constitution surely was never contemplated.

When the national Constitution was adopted, at least three of the several states had what was known as an "executive council." Though this was rather an administrative or an executive name, in function the body was legislative; that is, it was the law-making power of the state. The Constitution of Ohio nowhere uses the word "legislature," and if the strict letter of the law be applied, Ohio has no legislature in the strict and technical sense. Its legislature is a "general assembly" plus the referendum

in the hands of the people. The constitutional fathers were wise in delegating this power to the states and designating the legislatures of those states as the ratifying power. They could have as readily designated the Governors, or the highest court in the state. But there was fitness in recognizing the governmental function exercised as a lawmaking function, and that therefore the most appropriate body to make the laws for the nation, by way of constitutional amendment, was the same body that made the laws of the state. This they said, and this they meant.

There is but one way, in my judgment, in view of Articles 1 and 5 of the national Constitution, in view of the decision in the Hildebrant case, *supra*, to sustain a judgment against the referendum in the case at bar, and that is by reversing the Hildebrant case and holding that the constitutional amendment of Ohio of 1912, on the referendum in lawmaking generally, and the amendment of 1918, on the ratification of amendments to the national Constitution, are both in clear conflict with Article 5 of the national Constitution.

The United States Supreme Court has repeatedly held that before a state or national law may be held unconstitutional the conflict must be clear to a degree known as beyond a reasonable doubt; and, if any doubt exists, that doubt must be resolved in favor of the state.

The Ohio Constitution, as amended in 1912 and 1918, is reasonably reconcilable with Article 5, as it is with Article 1.

The judgment is supported by both reason and authority.

Dissenting Opinion.

Robinson, J.:

I dissent from the judgment in this case for the reason that the judgment is, and must be, based upon an amendment to a state Constitution and a new and strained definition of the word "legislature" expounded by a state court.

At the time of the adoption of the federal Constitution the term "legislature" had a certain, definite meaning as the representative body delegated by the electors to make laws, and was so understood and intended as used in Article 5 thereof. Obviously the fundamental law does not change automatically with public sentiment and public policy, but changes only when public sentiment and public policy force an amendment thereto. No amendment has been made to Article 5, and I am not ready to participate in a misapplication of its plain and expressed meaning, nor to consent to an amendment to the federal Constitution by any other process than the process therein provided.

In my opinion the judgment here elevates state above nation, devitalizes the federal Constitution, makes it subject to as many interpretations as there are states, and destroys its uniform operation throughout the nation.

III.

OPINION OF THE SUPREME COURT OF OREGON.

IN RE KARL HERBRING, PETITIONER, v. GEORGE M. BROWN, AS ATTORNEY GENERAL OF THE STATE OF OREGON.

McBride, C. J., all concurring:

This is a proceeding in mandamus arising from the following facts: During the 30th Legislative Assembly of the state of Oregon, which adjourned February 27, 1919, there was enacted House Joint Resolution No. 1, which is a ratification of a proposed amendment of the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On March 18, 1919, petitioner filed with the Secretary of State of Oregon a proposed form of petition demanding a referendum of said Resolution, which petition is in form and substance as required by law.

On March 19, 1919, the Secretary of State sent to the Attorney General two copies of said petition and requested him to provide a ballot title therefor.

On March 25, 1919, after considering the matter in the meantime, the Attorney General refused to provide a ballot title on the ground that in his opinion the measure was one which could not be referred to the people for two reasons: First, that a reference thereof to the people would violate Article V of the federal Constitution, wherein that article provides that the subject matter thereof should be passed on by the "legislature," which, as there used, is synonymous with "legislative assembly," and excludes the referendum. Second, that such refer-

ence to the people would violate Section 1 of Article IV, of the Oregon Constitution, wherein it is provided that the people of Oregon "also reserve power at their own option to approve or reject at the polls any act of the legislative assembly," because, it is claimed, the resolution sought to be referred is not an act within the meaning of the above quoted phrase.

Much of the argument here is devoted to a discussion of the constitutionality of the proposed reference.

We do not believe this resolution, ratifying the proposed constitutional amendment or any other resolution of our legislature, was made the subject of referendum by Sections 1 and 1a of Article IV, of our amended Constitution, which are as follows:

> Section 1. The legislative authority of the state shall be vested in a Legislative Assembly, consisting of a Senate and a House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also to reserve power of their own option to approve, or reject, at the polls, any act of the legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or

safety) either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be: "Be it enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided for.

Section 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against

> a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of an act from becoming operative. the initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town.

It seems clear to us that these sections apply only to proposed laws, and not to legislative resolutions, memorials and the like. In the initiative clause, it is said:

> The people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls.

The reservation clause reads:

> And also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

In the provision for referendum we find a direction that,

> Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the ses-

> sion of the legislative assembly which passed the bill on which the referendum was demanded.

In Section 1a we find the provision, that

> The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly, in the same manner in which such power may be exercised against a complete act.

To ascertain what is meant by the term "Bill" and "Act," as used in the amendments quoted above, we must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed. The word "Bill" occurs in Section 2 of Article IV of the original Constitution where it is said, "The style of every bill shall be 'Be it enacted by the legislative assembly of the State of Oregon,' and no law shall be enacted except by Bill," thus indicating that a bill is a proposed law; a document in the form of a law presented to the legislature for enactment.

The same word is used in Sections 18 and 19 of Article IV, and Section 15 of Article V, and in the same sense as above indicated.

We come now to the term "act" as used in the Constitution. In Section 20 of Article IV, we find the following:

> Every act shall contain but one subject and matters properly connected therewith, which subject shall be embraced in the title. But if any subject shall be embraced in an act which shall not be embraced in the title, such act shall be void, only as to so much thereof as shall not be expressed in the title.

In Section 21, Article IV, the following occurs:

> Every act and joint resolution shall be plainly worded, etc.

In Section 22 of the same Article, it is ordained:

> No act shall ever be revised or amended by mere reference to its title, etc.

And in Section 28, it is prescribed:

> No act shall take effect until ninety days from the end of the session, etc.

No one can read these excerpts without at once arriving at the conclusion that, as referred to in the Constitution, the term "Bill" imports a document in the form of a law, presented to the legislature for enactment, and that the term "Act" as there used means a bill which has been enacted by the legislature into a law. That the framers of the Constitution intended to preserve the well known distinction between "Acts" and "Joint Resolutions," as indicated in Section 21, *supra*, wherein it is required that acts and joint resolutions shall be plainly worded.

The initiative and referendum amendments were passed and should be construed in the light of the construction put into the terms "Bill" and "Act," by the instrument they proposed to amend, and taking this view it must be held that as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

Counsel for petitioner suggest that the term "Measures" used in the amendment enlarges the scope of the powers reserved beyond the express reservation, but this is evidently not the purpose with which that term is employed. As before observed, there are two powers reserved: (1) the power to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and

(2) the power to enact or reject at the polls any act of the legislative assembly. The subject matter upon which these powers may be exercised, namely: initiative laws, constitutional amendments, and acts of the legislature referred to the people, are thereafter referred to collectively as "measures" merely as a matter of convenience and to avoid frequent enumeration of the powers reserved, and not with the intent to include other and different powers within the scope of the amendment. Had it been the intent of the framers of the referendum amendment to go beyond these express reservations, it would have been easy and natural for them to have said so.

To give the amendment the effect contended for by petitioners, we would have to read into the reservation the words "and resolutions," making it read, "The people reserve to themselves power * * * to approve or reject at the polls any act (or joint resolution) of the legislative assembly," and where the amendment requires that the referendum petition shall be filed within 90 days, "after the final adjournment of the legislature which passed the bill," we would be required to judicially amend the section so as to make it read, "within ninety days after the final adjournment of the legislature which passed the bill (or joint resolution)."

We are not prepared to go into the business of amending the Constitution to meet supposed hardships, and must hold that the referendum cannot be invoked in the present instance.

Under an amendment to the Constitution of California, in some particulars copied from that here discussed, and in all necessary particulars the same in substance, the Supreme Court of that state has held that the referendum can only be invoked against statutes and not against joint

resolutions. *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 Pac. 977.

It is further urged that, even conceding that the resolution is not one which our amended constitution permits to be placed upon the ballot, the attorney general is not the person or the official who is entitled to raise the question; that his duties being purely ministerial, he is required to place a ballot title upon any petition filed with the Secretary of State and transmitted to him, as required by Section 3475, L. O. L., as amended by Chap. 176, laws 1917.

It may well be contended that if a matter proposed for reference to the electorate is within the class of subjects upon which the constitution permits a referendum, to-wit: acts passed by the legislature, the Attorney General has no authority to pass upon the constitutionality of the procedure. This would certainly be a plausible contention in the case of petitions under the initiative provisions of the section now being considered. He probably could not be heard to say: "The law you propose to initiate would be unconstitutional if passed, therefore I will not give you a ballot title," but such a case is not before us. We have here presented a case where it is proposed to put upon the ballot for reference a proceeding by the legislature for which the constitution has made no provision, and which does not belong to a class of subjects that can be referred under any circumstances. To hold that the Attorney General must prepare a ballot title under such circumstances, would place him at the beck and call of any restless person who might desire to refer any subject for the purpose of obtaining a straw vote upon it, from a joint memorial petitioning Congress to improve a

harbor up to the action of the Peace Conference upon the covenant of the League of Nations.

The act, of which the section referred to is a part, does not contemplate any such contingency, and the opening paragraph of the first section is itself a legislative interpretation of the scope of the constitutional amendment, and reads as follows:

> The following shall be substantially the form of petition for the referendum to the people, on any act passed by the Legislative Assembly of the State of Oregon, or by a City Council. Section 3470, L. O. L.

It is a petition to refer an act that must be filed with the Secretary of State, and it is to a petition for an act that the Attorney General is required to affix a ballot title.

The form of petition given in the section last referred to, is even more explicit. The descriptive portion of the form prescribed for a petition to refer, is as follows:

> We, the undersigned citizens and legal voters of the State of Oregon, (and the district of ....., County of ..... or city of ....., as the case may be) respectfully order that the senate (or house) bill No. ....., entitled (title of act, and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought) passed by the Legislative Assembly of the State of Oregon at the regular (special) session of the Legislative Assembly, shall be referred to the people of the state, etc.

The section of the statute requiring the Attorney General to fix a ballot title to petitions for a referendum, has reference to petitions regarding acts, that is, laws passed by the legislature; as to these he is compelled to

prepare ballots, but there is no statute requiring him to prepare such titles for any other.

This view renders it unnecessary to consider the other questions raised in the argument.

The demurrer will be sustained and the writ dismissed.

IV.

OPINION OF THE SUPREME COURT OF MAINE.

In re Opinion of the Justices.

Answers to questions propounded by the Governor to the Justice of the Supreme Judicial Court. Opinion by entire Court, all Justices concurring:

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned, Justices of the Supreme Judicial Court having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the Eighteenth Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the Legislature to the qualified voters of the state, respectfully submit the following answer:

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-Fifth Congress of the United States on December 3, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States, which amendment provides that after one year from ratification thereof the manufacture, sale, or transportation of intoxcating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is thereby prohibited.

This amendment, thus adopted by joint resolution of Congress, was proposed to the Legislature of Maine of 1919 for ratification, and was ratified by a joint resolve of the Senate and House of Representatives; the concluding paragraph, after reciting all the preliminary steps, being of the following tenor:

> Therefore resolved that the Legislature of the state of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the secretary of state of the state of Maine notify the Secretary of State of the United States of this action of the Legislature by forwarding to him an authenticated copy of this resolve.

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the secretary of state, requesting that this resolve be referred to the people under Amendment 31 of Article 4 of the Constitution of Maine, known as the initiative and referendum amendment, the question is now asked of the Justices whether this joint reserve of the Legislature of Maine, ratifying an amendment to the federal Constitution, proposed by and duly submitted for ratification by the Congress of the United States, is subject to the provisions of Amendment 31, and therefore must be referred to the people under the facts existing in this case.

ANSWER.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Consti-

tution of the United States was complete, final and conclusive, so far as the state of Maine was concerned, when the Legislature passed this resolve.

(1) Our reasons are as follows: The subject-matter of the action of the Legislature under consideration is a proposed amendment to the Constitution of the United States, the proposal and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows:

> Article 5. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Consttution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by convention in three-fourths thereof, as the one or the other mode may be proposed by the Congress.

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways:

First, from Congress, by joint resolution, whenever two-thirds of both Houses deem it necessary.

Second, from the states, whenever two-thirds of the Legislatures of the several states may request that a national constitutional convention be called for that purpose, in which case Congress must call such a convention.

(2, 3) All the federal amendments which have thus far been adopted have been proposed in compliance with the

first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *State v. Dahl*, 6 N. D. 81, 68 N.W. 418, 34 L. R. A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under power expressly conferred by Article 5, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

First, by the Legislatures of three-fourths of the several states; or,

Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature

in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

(4) Here, again, the state Legislature, in ratifying the amendment, as Congress in proposing it is not, strictly speaking, acting in the discharge of legislative duties and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly.

(5) It is a familiar, but none the less fundamental, principle of constitutional law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner, and this organic law was ordained and established, not by the states in their sovereign capacity, but by the people of the United States. The preamble, "We, the people," so states, and such is the fact, *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440. It is equally well settled that it was competent for the people to invest the federal government, through the Constitution, with all the powers which they might deem necessary or proper, and to make those powers, so far as conferred,

supreme, to prohibit the states from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to federal or state government. *Martin v. Hunter's Lessee,* 1 Wheat. 304, L. Ed. 97. Whether a certain power has been conferred either expressly or by reasonable implication upon the national government, or has been reserved to the states or to the people themselves, must depend upon the construction of the language of the Constitution governing that particular subject-matter.

(6) It admits of no doubt that in the matter of amendment which is governed by Article 5, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislatures or upon state constitutional conventions.

This view has the sanction, not only of reason, but of authority. Mr. Iredell, in the North Carolina convention which ratified the federal Constitution, in discussing this ratifying clause, said:

> By referring this business to the Legislatures, expense would be saved, and in general, it may be presumed, they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is therefore left discretionary. 4 Elliott, Deb. 176, 177.

This discretion, under the terms of Article 5, is to be exercised by Congress.

In *Dodge v. Woolsey,* 18 How. 331, 348 (15 L. Ed. 401), the Supreme Court of the United States, in emphasizing the supremacy of the Constitution, said:

> It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or when the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of the several states, or by convention in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. * * * Now, whether such supremacy of the Constitution, with its limitations in the particular just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it.

A well-known writer on Constitutional Law, after tracing the history and the scope of Article 5, concludes as follows:

> Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people either in legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted. Watson, Const. vol. 2, p. 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the federal government, that according to their admitted and accepted practice if a state legislature has once ratified a federal amendment a subsequent Legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the Fourteenth Amendment, and by New York with reference to the Fifteenth; but the proclamation of the Secretary of State for the United States was issued, announcing the final adoption of the amendments as a part of the federal Constitution, notwithstanding the attempted rescission by subsequent Legislatures. The attempted rescission was ignored. Watson, Const. vol. 2, p. 1315.

If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject-matter.

It follows, from what has been said, that even if the people of Maine, by adopting in 1908 the initiative and referendum amendment of our state Constitution, had attempted to assume or regain the power of ratification of proposed amendments to the federal Constitution, by exercising a supervisory authority over the state legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by Article 5, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify federal amendments. The authority is elsewhere.

(7) But the people, by the adoption of the initiative and referendum amendment, did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Me. 428, 446, 89 Atl. 944, and it was there held that the design of the initiative and referendum was to make the law-making power of the Legislature, not final, but subject to the will of the people, and to confer that power in the last analysis upon the people themselves. And the court adds:

> This, too, marks the limitation of the amendment. It applies only to legislation, to the making of law, whether it be a public act, a private act, or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of Article IV, under the general head of Legislative Power. "Every bill or resolution having the force of law to which the concurrence of both houses may be necessary, * * * which shall have passed both houses, shall be presented to the Governor, and if he approve, he shall sign it," etc. The referendum applies and was intended to apply, only to acts or resolves of this class, to "every bill or resolution having the force of law," that is, to what are commonly know as legislative acts and resolves, which are passed by both branches, are usually signed by the Governor, and are embodied in the Legislative Acts and Resolves, as printed and published. And the words "No act or joint resolution of the Legislature," etc., before quoted, in the referendum amendment must be construed in the light of the context, considering all the sections and parts and articles together, as mean-

> ing "no act or joint resolution of the Legislature having the force of law." This is the simple and plain interpretation of simple and plain language.

In the application of that rule of construction this court held in that case that a joint address to the Governor on the part of both branches of the Legislature calling for removal of a public officer was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article 5 of the Federal Constitution to perform that particular act. The principles laid down in *Moulton v. Scully* are decisive of this point.

The Supreme Court of Oregon, in a case decided on April 29, 1919, passed upon this branch of the question, where this same federal amendment was involved, and held that the term "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed laws, *Herbring v. Brown*, 180 Pac. 328.

In conclusion, it may be said that not only have all previous amendments to the federal Constitution been ratified by two-thirds of the legislatures of the several states, but this particular Eighteenth Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this Eighteenth Amendment had been duly ratified by the Legislatures of three-fourths of the states, including by name the state of Maine, and therefore certifying, in pursuance of Rev. St. U. S. 205 (U. S. Comp. St. 303.), that the amendment aforesaid has became valid to all intents and purposes as a part of the Constitution of the United States. See appendix to part 2 of U. S. Stat. 3d Session, Sixty-fifth Congress, 1918-1919.

The construction which we adopted is evidently the same which the federal authorities have placed upon the federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

V.

OPINION OF THE SUPREME COURT OF COLORADO.

IN RE CHARLES B. PRIOR, CLARENCE E. LEARY, WALTER M. APPEL, PLAINTIFFS IN ERROR, V. JAMES R. NOLAND, AS SECRETARY OF STATE OF THE STATE OF COLORADO, DEFENDANT IN ERROR. No. 9649.

Allen, J., Justices Burke nd Teller concurring; Justice Denison dissenting:

This is a suit in mandamus. The trial court sustained a demurrer to the petition, and a judgment of dismissal was entered. The petitioners bring the cause here for review, assigning as error the sustaining of the demurrer.

The petition for a writ of mandamus, with the exhibit attached thereto, discloses the following facts:

The 65th Congress of the United States, at is second session, in December, 1917, by a joint resolution duly adopted, proposed an amendment to the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On January 15, 1919, the General Assembly of the State of Colorado ratified the proposed amendment by a concurrent resolution, which, after reciting the joint resolution of congress proposing the amendment, contains the following language:

> *Therefore, be it resolved* by the joint assembly of the State of Colorado, that the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the Joint Assembly of the State of Colorado.

Thereafter, and prior to June 10, 1919, referendum petitions were prepared and signed, and were tendered for filing to the secretary of state. In these petitions, the signers "order and demand" that the resolution of the Joint Assembly, ratifying the National Prohibition Amendment, shall be submitted to the legal voters for their adoption or rejection at the polls," etc. The persons designated to represent the signers of the referendum petition are the petitioners of this mandamus suit, the plaintiffs in error.

The secretary of the State of Colorado, who is the respondent in this case, the defendant in error, refused to file the petitions, or to so act in the premises, whereby the concurrent resolution in question would be submitted to the voters at the next general election for their adop-

tion or rejection. It is to compel him to thus act, and to file the petitions, that the writ is sought.

The demurrers, which was sustained, and the argument thereon, present two questions, namely:

1. Does Article V, of the federal Constitution, providing for ratification of proposed amendments "by the legislatures of three-fourths of the several states," forbid the exercise of the referendum upon a joint concurrent resolution of the Joint Assembly ratifying a proposed amendment to the Constitution of the United States?

2. Does Section 1 of Article V of the Constitution of the State of Colorado authorize and permit the exercise of the referendum upon such resolution?

Our discussion will be confined, chiefly, to the provisions of the state constitution relating to the referendum; in other words, to the second question above mentioned.

Section 1, of Article V, of the State Constitution, so far as the same is pertinent to this case, reads as follows (italics ours):

> Section 1. The legislative power of the state shall be vested in the Joint Assembly consisting of a senate, a house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose *laws* and amendments to the constitution and to enact or reject the same at the polls independent of the General Assembly, and also reserve power at their option to approve or reject any act, item, section or part of any *act* of the General Assembly.
>
> "The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, * * *
>
> The second power hereby reserved is the

> *referendum,* and it may be ordered * * * against any act, section or part of any *act* of the General Assembly, * * * referendum petitions shall be addressed to and filed with the Secretary of State not more than ninety days after the final adjournment of the session of the General Assembly, that passed the *bill* on which the referendum is demanded. The filing of a referendum petition against any item, section or part of act, prevents the same from becoming operative. The veto power of the Governors shall not extend to *measures* initiated by, or referred to, the people. All elections on *measures* referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the *law* or a part of the constitution, when approved by a majority of the votes cast thereon. * * * this section shall not be construed to deprive the general assembly of the right to enact any measure. * * *
>
> The Secretary of State shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance herewith.

From the above quoted constitutional amendment, it is seen that the people, in granting legislative powers to the General Assembly, reserved to themselves "the power at their option to approve or reject any act * * * of the General Assembly."

The controversy in the instant case, upon the question now under consideration, centers about the word "act" in the clause last above quoted. It is the contention of the plaintiffs in error that the word is broad enough to comprehend not only a general statute, enacted by a bill, but also such concurrent resolution as the one involved in this case.

The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them. 12 C. J. 705. In the popular sense, the term "act" refers to a general statute, or law, enacted by a bill. A resolution, concurrent or otherwise, is commonly referred to as a "resolution." The rule that the words and terms of a constitution are to be interpreted and understood in their most natural obvious meaning, also tends to exclude a resolution from the meaning of the term "act." An act is a law, and under our state constitution, "no law shall be passed except by bill." Section 17, Article V. It is only in the sense of a law, statute, that the term "act" is used in the initiative and referendum constitutional amendment. This conclusion is aided by the fact that the term in question is used in connection with the word "bill," where it is provided, that referendum petitions shall be filed, etc., after the adjournment of the General Assembly that "passed the bill on which the referendum is demanded." The concurrent resolution involved in the instant case was not passed by a bill; neither does it have the enacting clause required for "the laws of the state" by Section 18, Article V, of the state constitution. A resolution is not a bill. *May v. Rice*, 91 Ind. 551. The distinctions between a bill and resolution are well defined. *Henderson v. Lithographing Co.*, 2 Colo. App. 257. Under the circumstances, we may adopt the following language, contained in *Lithographing Co. v. Henderson*, 18 Colo. 262:

> The concurrent resolution adopted by the senate, * * * and by the house, * * * cannot be held to be a law of the state. The resolution was not passed by "bill" as provided by Sections 17 and 18, of the Constitution.

In *Herbring v. Brown*, 180 Pac. 328, the Supreme Court of Oregon, without a dissenting vote, held that the various sections of their initiative and referendum amendment "applied only to proposed laws, and not to legislative resolutions, memorials, and the like," and therefore, did not apply to the legislative resolution involved in that case, which was a joint resolution of their legislative assembly, ratifying the national prohibition amendment. The Oregon court in arriving at its conclusion, considered and adopted the sense in which the terms "bill" and "act" were used in the constitution before the initiative and referendum amendments were adopted. The same method may properly be employed in the instant case, with the same result, holding that the term "act" as used in various parts of the constitution, "means a bill which has been enacted by the legislature into a law," and further that:

> The initiative and referendum amendments were passed and should be construed in the light of the consideration put upon the terms 'bill' and 'act' by the instrument that it proposed to amend, and taking this view it must be held that, as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

The decision of the Oregon court, holding that a legislative resolution ratifying an amendment to the federal constitution could not be referred to the people, was not based on any grounds coming beyond the provisions of the state constitution itself, or the matters hereinbefore discussed. What has already been said in this opinion is sufficient to dispose of this case, resulting in the determination that our state constitution does not authorize or

permit the exercise of the referendum on any concurrent resolution, or upon the one involved in the instant case.

There are other reasons why the resolutions involved in this case is not subject to the referendum. One of these is suggested by the argument of the plaintiffs in error, wherein they state that "it is not reasonable to believe" that the people intended, when adopting the initiative and referendum amendment, "to deny to themselves the right to adopt or reject a measure which, once adopted, can never be amended or repealed except by the concurrence of three-fourths of the states of the Union." In ordinary legislative matters, the general assembly, of course, derives its power from the people of the state, and the people may reserve to themselves any power they desire, but in the matter of the ratification of a proposed amendment to the federal Constitution, the general assembly does not act in pursuance or any power delegated or given to it by the state constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States. That article provides that proposed amendments "shall be valid, * * * as parts of the constitution, when ratified by the legislatures of three-fourths of the several states." A ratification by a general assembly, of a proposed amendment to the federal Constitution, is not, therefore, a law, making legislation for the state, subject to approval or rejection by the referendum. In this connection, we adopt the language of In re Opinion of Justice (Maine), 107 Atl. 673, 674, as follows:

> * * * the state legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the dis-

> charge of legislative duties and functions as a law-making body, but is acting in behalf of, and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, from their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's council, or the Governor, with the power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the legislature; that is, the legislative assembly.

The conclusion just stated, as it is expressed in the paragraph above quoted, results from our opinion upon the question, raised by the demurrer, whether or not the federal constitution, in Article V thereof, permits a referendum and a resolution of a general assembly which ratifies a proposed amendment to the Constitution of the United States. Article V provides for a ratification of proposed amendments by the "legislatures." It is the contention of the plaintiffs in error that the word "legislatures" thus used, means "the whole legislative power of the state." This definition is intended to be made applicable in the instant case by including the legislative power of the people as given by the referendum. In our opinion, however, the term "legislature" as used in Article V, of the federal Constitution, means that body of persons composing the ordinary representative law-making body of the state. Under that definition it necessarily follows that the people have no power to ratify a proposed amendment to the federal Constitution, by a popular vote, and therefore can not exercise the referendum upon such a ratifying legislative resolution as is involved in the in-

stant case. The conclusion we reach in this matter, is the one adopted, and ably supported, in the opinion of the Justices of the Supreme Judicial Court of Maine, all justices concurring, reported in 107 Atl. 673. A discussion of this subject, which arrives at the same result, may be found in the dissenting opinion of Justice Parker in *State v. Howell*, (Wash.), 181 Pac. 928.

The judgment is affirmed.

VI.

OPINION OF THE SUPREME COURT OF ARKANSAS.

IN RE WHITTEMORE V. TERRAL, SECRETARY OF STATE.
No. 5845.

McCulloch, C. J.:

The General Assembly of this State, during the last session thereof, adopted a joint resolution ratifying the proposed amendment to the Constitution of the United States prohibiting "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes," and appellants and other legal voters, constituting more than five per centum of the voters of the states, filed their petition with the Secretary of State in apt time asking for a referendum to the people of said resolution in accordance with the provisions of Amendment No. 10 to the Constitution. The Secretary of State refused to certify the referendum, and this action was instituted by appellants in the Circuit Court of Pulaski County to compel him to do so.

The contention of appellants is (1) That the federal Constitution, in providing for the ratification of amendments by the legislatures of three-fourths of the several states, does not restrict the powers of the states so as to prohibit them from controlling the action of their representative legislative assemblies by referendum to the people or otherwise, but that it relates to the ultimate legislative authority of the states in whatever form expressed; and (2) That the action of the General Assembly of this State ratifying the amendment falls within the terms of Amendment No. 10, providing for the referendum.

On the other hand, it is contended by the Attorney General who appears on behalf of the Secretary of State, that the power of ratification conferred by the federal Constitution relates solely to the legislative assemblies of the states, that it cannot be brought within the reserved legislative authority of the peopie themselves, and that the language of Amendment No. 10 does not apply the referendum to action of the General Assembly in ratifying an amendment to the federal Constitution. We proceed to a consideration of the last of the propositions stated, and since our conclusion on that is found to be decisive of this case, we need go no further.

Amendment No. 10 does not, in our opinion, provide for a referendum on the action of the General Assembly in ratifying an amendment to the federal Constitution. That portion of our Constitution reads as follows: "The legislative powers of this state shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the state, reserve to themselves power to propose laws and amendments to the Constitutio nand to enact or reject the same at the polls as

independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a referendum, and it may be ordered, (except as to laws necessary for the immediate preservation of the public peace, health or safety, either by the petition signed by five per cent. of the legal voters or by the Legislative Assembly as other appeals are enacted.) Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembl ywhich passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become a la wwhen it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be it Enacted by the People of the State of Arkansas.' This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative, or

for the referendum, shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people, he and all other officers, shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor.

An analysis of this provision of our Constitution reveals the fact that the reserve referendum power of the people relates only to laws enacted by the General Assembly. The word "act," as there used, means an enacted law—a statute. This is clearly manifested by that part of the language used which provides that referendum petitions must be filed not more than ninety days after adjournment of the session "At which the bill on which the referendum is demanded," and that a "Measure referred to the people shall take effect and become a law when it is approved by a majority vote thereon." The words "act" and "measure" and "law" are used interchangeably, showing plainly that the power relates to the enactment of laws, and not to the exercise of other functions by the legislative body. The word "act" is not so frequently used in our Constitution as to give fixed definition to it, but in one instance, it is made use of in such a way as to clearly indicate the reference to a statute. Section 31, Article 5. But aside from any definition fixed in the Constitution, and aside from the technical definition given by lexicographers, we know that the term "Act of the legislature" not only has a fixed popular meaning, but that the unbroken custom in the enactment of laws is to make use of the term "act" in the caption or title to a statute. In turning through the printed satutes, we find,

without exception, that the form of caption used is "An Act to Provide" or "An Act to Amend," etc., showing the universal legislative practice to treat the set form as expressive of the meaning that an act of the legislature relates to a law and not to other proceedings of the legislature. Amendment No. 10 was adopted to change the Constitution only with respect to those things in conflict with the amendment (*Hodges v. Dawdy*, 104 Ark. 583) and the language of the amendment can be understood in the meaning in which it was used in the Constitution and in the legislative opinion.

Now the action of the legislature, pursuant to the power conferred by the federal Constitution, ratifying a proposed amendment to that Constitution is not the enactment of a law. It possesses none of those elements. Laws are enacted only when the legislative will is accomplished. They may be proposed by legislative bills or resolutions, according to constitutional provisions prescribing the method of exercise of the legslative functions, but they do not become laws until the enactment is consummated. The ratification by the legislature of an amendment to the federal Constitution is but a step in the enactment of a law, and that step does not amount to a law even though it results, with the joint action of other states, in the adoption of the proposed constitutional amendment.

The Attorney General, in his brief, very appropriately likens it to a roll call of the states upon the question of ratification, and he adds that the action of the legislature of a single state is of itself "no force as a law, makes no rule of conduct or government, and provides no penalty." This is correct. The action of the General Assembly in the ratification of an amendment to the federal

Constitution is not a law, and our conclusion is that such action does not fall within the provisions of Amendment No. 10.

It is interesting to know that the Supreme Court of Oregon reached the same conclusion in deciding this question under the referendum provision of the Constitution from which the precise language of Amendment No. 10 was borrowed. *Herbring v. Brown,* 180 Pac. 328. We approve the reason of the court given in that case for reaching the same conclusion which we now reach.

The Supreme Court of the State of Washington reached the opposite conclusion in the case of *Miller v. Howell,* 181 Pac., 920, in construing somewhat similar language in their constitutional provision concerning the reserved referendum power; but we do not agree with that court in its process of reasoning, nor in the result reached.

It follows that the Circuit Court was correct in its decision, and the judgment is affirmed.

VII.

OPINION OF THE SUPREME COURT OF CALIFORNIA.

IN RE J. A. BARLOTTI, PETITIONER, V. D. B. LYONS, AS REGISTRAR OF VOTERS OF VOTERS OF THE COUNTY OF LOS ANGELES. No. 6219.

Angellotti, C. J., Justices Shaw, Wilbur, Olney, Lennon, and Lawlor, concurring:

This is a proceeding in mandamus, the object being to procure a writ requiring respondent to file in his office for examination and transmission to the Secretary of State

a referendum petition for the submission to the electors of the state, for their approval or rejection, of the joint resolution of the senate and assembly ratifying for the State of California what is known as the eighteenth amendment to the Constitution of the United States, relating to intoxicating liquors. Two questions are presented; one being whether in view of the provisions of Article V of the Constitution of the United States, the question of the ratification of the proposed amendment by the state was not finally and conclusively determined by the adoption of the joint resolution of ratification by the legislature, utterly regardless of the construction to be given to the provisions of our own constitution, and the other being whether the referendum provisions of our state Constitution (Section 1, Article IV) may be construed as intended to be applicable in the case of a resolution of the character of the one here involved.

With reference to the former of these questions, it is conceded, as necessarily it must be conceded, that in so far as the Constitution of the United States speaks upon the matter of amendments thereto, it controls, and any provision of a state Constitution in conflict therewith must be held as naught. Article V, of that Constitution, relative to amendments, in so far as is material here, provides: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the Constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be pro-*

posed by the Congress, * * * " (The italicts are ours.) In the case at bar, the amendment was proposed by the Congress of the United States, and the joint resolution of proposal declared that the amendment would "become valid as a part of the Constitution when ratified by the legislatures of the several states as provided by the Constitution." The effective words of ratification of the joint resolution of our legislature were: "Resolved by the senate and the assembly of the legislature of the State of California, jointly, at its forty-third session * * * that the said proposed amendment be and the same is hereby ratified by the legislature of the State of California." The question we have in this connection is a very narrow one, being simply one as to the meaning of the word "legislatures" as used in the clause "when ratified by *the legislatures* of three-fourths of the several states" of Article V, of the Constitution of the United States. If, by those words was meant the *representative bodies* invested with the law-making power of the several states, which existed at the time of the adoption of the Constitution under one name or another in each of the several states, and which have ever since so existed, as distinguished from the law-making power of the respective states; there is nothing left to discuss, for with that meaning attributd to the term "the legislatures" the constitutional provision is so plain and unambiguous as not to admit of different constructions. The situation would then be that the people of the United States in framing and ratifying the Constitution in the manner provided therein "have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-

thirds of both houses shall propose them, or when the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other modes of ratification may be proposed by Congress." (*Dodge v. Woolsey*, 18 How. 331, 348.) As further suggested in this connection in the case just cited, the Constitution of the United States is supreme in the matter of amendments regardless of whether or not the method prescribed thereby "be right or wrong politically."

It certainly is not in consonance with the ordinary acceptation of the term "legislature" to take it as meaning otherwise then a representative body selected by the people of a state and invested with the power of law-making for the state, whatever be the power reserved to the people themselves to review the action of that body or to initiate and adopt laws. Our owa Constitution, notwithstanding its provisions in regard to the initiative and referendum, could not be more explicit than it is in its use of the term as meaning such a representative body, and while in view of the initiative and referendum provisions the people of the state may constitute a part of the law making power of the state, they certainly are not a part of "the legislature" within the meaning of that term as used in our Constitution. By Section 1, of Article IV, of the Constitution, it is declared that the representative bodies designated as the Senate and Assembly, concerning the membership of which and the method of selecting the members Article IV makes provision, shall be designated "The Legislature of the State of California," and over

and over again, wherever in the Constituion the legislature is referred to, it obviously and necessarily means, this representative body provided for therein which is made up of the Senate and assembly designated as above stated. The initiative and referendum provisions constitute simply a reservation of power *in the people* to propose and enact laws *independent* of "*the legislature*," and to adopt or reject any act of "*the legislature*." This has always been the meaning ordinarily attributed to the term in this country, and it is difficult indeed to conceive that the makers of the Constitution of the United States in providing for ratification "*by the legislature* of three-fourths of the several states or by *conventions* in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress," intended by the words "the legislatures" anything other than the represntative law-making bodies of the several states. At the time of the adoption of the federal Constitution, as is shown by the brief of learned counsel for petitioner, every state had such a body, existing under one name or another, and, of course, it was to be assumed that in accord with our guaranteed republican form of government each state would always have such a body. Just what this *body* should be, what called, how constituted, whether bicameral in form or not, was a matter for each state to determine, but the essential characteristic of the thing was that it was a representative official body, invested with the functions of law-making, the legislative official body of the state. That this conception of the meaning of the term was in the mind of the framers of the Constitution is shown by other provisions. Section 2, of Article 1, providing that the House of Representatives shall be composed of members chosen by the people of the several states,

the state constitution, and including the people of the state when authorized to act in view of referendum provisions contained in the state Constitution. The same conclusion was reached by the Supreme Court of Ohio in the *State v. Hildebrant*, 94 Ohio St. 154, but the decision in that case was also based on another ground, viz: the supremacy of an act of Congress which made the old districting act in Ohio the only effective method of electing members of Congress "until such state shall be redistricted *in the manner provided by the laws thereof.*" It was held that the Congress in enacting its paramount law on the subject (Sub. 1, Section 4, Article 1) intended to provide that the old districting act of the state should remain in force until a redistricting was had in all respects as contemplated by the laws of Ohio, and that the insertion of the words we have italicized was for the very purpose of authorizing a resort to the referendum which was provided for in the Constitution of Ohio, as seemed apparent from the debates in Congress on the adoption of the act. It was on this ground alone that the decision of the Ohio court was affirmed by the Supreme Court of the United States. (*State v. Hildebrant*, 241 U. S. 565.) That in view of that part of Sub. 1 of Section 4, of Article 1, clothing the Congress with paramount power to make regulations in this matter, the act of that body was a valid enactment unless to include the referendum in the scope of legislative power was a violation of the guaranty of a republican form of government, appears to have been conceded, and the suggestion that it was beyond the power of the Congress in that it disregarded this constitutional guaranty, was disposed of under the settled rule that such a question presents no justiciable controversy but involves

the exercise by Congress of the authority vested in it by the Constitution. (*Pacific Telephone Co. v. Oregon*, 223 U. S. 118.)

The alternative method of ratification which the Congress was given power by Article V to provide, implies that in the use of the words "the legislatures," etc., in the same article, these representative bodies were meant. The ratification was to be "by the legislatures," etc., or "by conventions (necessarily representative bodies) in three-fourths," etc., "as the one or the other mode of ratification may be proposed by the Congress." In each case it was a ratification by a *representative body* which, it was assumed would correctly express the desire of the people of the state as to approval or rejection of the proposed amendment, and was apparently contemplated. The use of the words "by *the legislatures* of three-fourths," etc., itself implies this meaning. The words imply some official body of a state and distinguished from the state itself or the people of the state or the whole law-making power of the state. If anything differing from the ordinary conception of the term had been intended, or anything different from its plain and obvious meaning as used elsewhere in the Constitution in many instances, and so far as we can see in every other instance, it seems fair to assume that words indicating that meaning would have been used. It was said in *McPherson v. Blacker*, 146 U. S., at page 27, "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids of interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text." It is true enough that with regard to proposed amendments the idea was that each *state* should speak for itself in the matter of ratification by voting yea or nay

thereon. But the further question considered by the framers of the Constitution was *in what manner the state* should *give its vote*, for that after all is what the state is doing when it joins i nthe ratification of a proposed amendment to the federal Constitution, and, as in the case of the selection of senators from each state, the people of the United States saw fit to provide that the vote should be given by "the legislature" of the state, doubtless concluding, whether correctly or not, that in this way the real desire of the people of the state would be correctly expressed. The adoption during recent years in many states of the initiative and referendum, of course, implies, as did the amendment of the federal Constitution with relation to the selection of United States Senators, a conclusion on the part of very many people, that the representative body known as the legislature cannot always be relied on to express the real desire of the people of a state, but this view in so far as it finds expression in constitutions or statutes is certainly a matter of comparatively recent origin. We must continually bear in mind that our sole question in this connection is what did *the framers of the Constitution* intend by the term "the legislatures of * * * the several states" in Article V, and that if by the term they intended the representative official bodies to which we have referred, as we think must be held, a state has no power to prescribe for itself a different ratifying power. All questions as to the good policy of such a provision, or whether it is in accord with the view entertained by very many today that the people of a state should have a vote as such a matter, are beside the question. The people of the United States in framing and enacting the Constitution have ordained in Article 5 thereof in language that we think admits of only one rea-

sonable construction, that in the matter of ratifying a proposed amendment the people of the respective states shall speak on the question of ratification *solely and finally through their official representative legislative bodies,* where the Congress in submitting the amendment proposes that method of ratification.

Our conclusion in this matter is in accord with that reached by the Supreme Court of Maine on this very question. (See In Re opinion of the Justices, 107 Atl. Rep. 673.) It is opposed to the conclusion of the Supreme Courts of Washington and Ohio. (*State v. Howell,* (Wash.), 181 Pac. Rep. 920; *Hawke v. Smith,* (Ohio), decided September 30th, 1919.) In each of these cases there was a dissenting opinion. In the Washington case, the prevailing opinion, written by Mr. Chief Justice Chadwick, exhaustively and forcefully presents the argument for a contrary conclusion. It seems to us, and we say it with the utmost respect for the learned judges who have reached a conclusion differing from ours, that the argument in support of their conclusion is in the final analysis based more upon some present day conceptions of what the law in this regard ought to be, than upon the intention of the framers of the Constitution *as expressed therein,* and to our mind expressed so clearly as to preclude any other conclusion than the one we have reached. Of course, all will admit that in so far as the question before us is concerned, the words of Article V here involved, must be taken today to mean exactly what they meant when originally written into the Constitution, regardless of any change in view as to the wisdom of the policy of such a provision. In other words, if they the meant the official *representative law-making body* of the state, they mean

the same thing today, with the result that a change in the method can properly be accomplished only by amending the law.

In view of our conclusion on the question we have discussed, we deem it unnecessary to discuss the other question presented.

The alternative writ heretofore isued is discharged and the proceeding dismissed.

VIII.

OPINION OF THE SUPREME COURT OF MICHIGAN.

IN RE ARTHUR DECHER, CHARLES W. DITTMAR AND GUSTAV C. DUST, RELATORS, V. COLEMAN C. VAUGHAN, SECRETARY OF STATE, RESPONDENT.

Sharp, J., Chief Justice Moore and Justices Steers, Brooks, Fellows, Stone, Clark and Bird, concurring:

At the regular session of the legislature of the State of Michigan, in 1919, a resolution, ratifying a proposed amendment to the Constitution of the United States providing for national prohibition, was adopted. A petition in proper form, asking that such resolution be submitted to the electors for adoption or rejection under the referendum provision in our state Constitution, was presented to the respondent, who, on the advice of the attorney general, declined to act upon the same, and mandamus is sought to compel him to do so. In his return to the order to show cause granted by this court, the respondent admits the facts stated in the petition to be true, but denies the right of the relators to relief for the following reasons:

1. That the Congress of the United States, pursuant to the provisions of Article V, of the Constitution of the United States, proposed said amendment and directed that the same be submitted to the legislatures of the several states for ratification.

2. That the action of the legislature of the State of Michigan ratifying said amendment in accordance with the direction of the Congress of the United States is final and not subject to referendum.

Article V, Section 1, of our State Constitution, reads as follows:

> The legislative power of the State of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds. The first power reserved by the people is the initiative. * * *
>
> The second power reserved to the people is the referendum. * * *

The prohibition amendment was proposed and submitted by the national congress under the provisions of Article V, of the Constitution of the United States, which reads as follows:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of

> the several states, or by conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the Year One Thousand Eight Hundred and Eight shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no state, without its consent, shall be deprived of its equal Suffrage in the Senate.

The questions presented are:

1. Does the word "legislature" in the provision of the federal Constitution and in the joint resolution of congress mean "the legislative assembly" or "the legislative authority of the state?"

2. Does the word "act" in the referendum provision of the state Constitution include the action of the legislature in adopting such a joint resolution?"

Official notice of the ratification by the requisite number of states has been received by the secretary of state, and the amendment is now treated by that and the other departments of the national government as a part of the Constitution. The congress has so recognized it by the passage of a law (the Volstead Act, approved October 28, 1919,) for its enforcement.

1. It is elemental that the people of any one state cannot, by any provision in its Constitution or laws, amend the federal Constitution. It was adopted as the supreme law of the republic by the people of all the states, and can be changed only in the manner provided therein. It follows, therefore, that we must look to it alone in determining how such amendment shall be proposed, ratified and adopted. If the language providing therefor is plain and unambigious, and had a well-defined meaning at the time

of its adoption, no one state can give it an interpretation to suit the desire of its people. As was said by Chief Justice Marshall in *Cohens v. State of Virginia*, 6 Wheat. 264:

> The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

Justice Story has also said:

> When its words are plain, clear and determinate, they require no interpretation and it should therefore be admitted, if at all, with great caution and only from necessity either to escape some absurd consequence or to guard against some fatal evil. Story on Constitution. ————

In an early case in this court (*Bay City v. State Treasurer*, 23 Mich. 499), Mr. Justice Cooley, at page 506 said:

> Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action. * * * They the courts) must construe them as the people did in their adoption, if the means of arriving at that construction are within their power.

The purpose of the Constitution was to establish a representative form of government, not a pure democracy in which all power is exercised by the people acting as a whole. While it provides for a popular branch of the legislative department, to be elected at short intervals by the vote of those entitled to the elective franchise in

the several states, it is suggestive that neither the president, vice-president, nor United States senators, are to be so elected. It is also significant that when there was a popular demand that senators should be elected it was not deemed sufficient to provide in the state constitutions for a referendum in making the selection, although the Constitution provided that they "should be chosen by the legislature," but an amendment to the federal Constitution, the seventeenth, was adopted therefor.

The term "legislature" is thus defined:

> That body of men which makes the laws for a state or nation. Bouvier's Law Dictionary (Rawle's Ed.) 17.

And "legislative power" as—

> Authority exercised by that department of government which is charged with the enactment of law as distinguished from the executive and judicial functions. The law-making power of a sovereign state.

Counsel for the relators insist that under our state Constitution—

> The power to legislate is vested in both the Constituent Assembly and the electors themselves.

—that in writing Article V, of the federal Constitution, its framers intended to submit an amendment to such legislative power for ratification, and not merely to the legislative body known as the legislature.

We cannot but think that such an interpretation does violence to the plain meaning of the word legislature as understood at the time the federal Constitution was adopted. There were then law-making bodies, always referred to as "legislatures," in all of the colonies which under the constitution afterwards became states. This term is fre-

quently used in the Constituion, and an examination will reveal the fact that in most cases it could not be applied other than to such assemblies.

It is suggested that the intent of the Constitution is simply "to call the roll of states and get an expression from each state as to its will and desire." In what way shall such an expression be voiced? The Constitution says by the "legislatures." In making response, the members act collectively and when a majority of those constituting such bodies respond in the affirmative, and such action is certified to the federal authorities by a sufficient number of states, the amendment is adopted and is thereafter a part of the Constitution.

The action of the legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the federal Constitution. The congress, or the states by petition, must first propose an amendment. In order that it may become operative, it must receive the assent of the states by ratification in the manner provided in Article V. How shall such assent be expressed? By the adoption by the state legislature of a joint resolution ratifying the amendment. The state thus participates in the making of a new law simply by expressing its assent, thereto in the manner provided. It has not thereby enacted a law any more than the President or Governor does so by approving bills passed by the congress or legislature.

The language of Article V, of our state Constitution, negatives the claims of relators. It provides: "The legislative power of the State of Michigan is vested in a senate and house of representatives." This is followed by the provisions relating to the referendum wherein the right "To approve or reject at the polls any act passed by

the legislature" is reserved to the people. The framers of this instrument thus clearly distinguish between the legislative power vested in the legislature and the legislature itself. The former embraces the right to enact legislation, the latter the body in whom such right is primarily vested. Under the provisions which follow as to initiative and referendum, the people have no power to enact legislation until the proposal therefor has been submitted by petition to the legislature for action thereon. The right of the people to thus legislate in no way makes them a part of the legislature or changes the well-recognized meaning of that term.

Reliance is placed by counsel for relators on the decision in *Davis v. Hildebrant*, 94 Ohio St. 154, affirmed by the Supreme Court of the United States as *Davis v. Ohio*, 241 U. S. 565, in which the referendum provision of the Ohio Constitutions was held to apply to an act of the legislature redistricting the state for congressional purposes. The provision in the federal Constitution relating thereto reads:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators. Article 1, Section 4.

In pursance of the authority therein conferred, congress in 1842 provided for the election of representatives by districts, and in 1891 provided that the existing districts should continue in force "until the legislature of such state, in the manner herein prescribed, shall redistrict such state." An amendment in 1911 provided that the redis-

tricting should be made by a state "in the manner provided by the laws thereof." In discussing these provisions, Mr. Chief Justice White said:

> The legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words (in the manner provided by the laws thereof) inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged.

The laws of the state include the constitution as well as the statutes, and when congress provided that the redistricting should be made "in the manner provided by the laws" of the states, the provision in the state Constitution for a referendum on the action of the legislature could not but apply. We do not think this decision places any interpretation upon the word "legislature" as used in this Constitutional provision. It simply holds that, as congress was given the power to regulate the action of the states in redistricting ,it might confer upon the states the righ to provide therefor "in the manner provided by the laws" of each state and that the law of Ohio included the referendum provision of its Constitution.

The case of *McPherson v. Blacker*, 146 U. S. 1,(an appeal from this court, 92 Mich. 377), involving the power of the state legislature to provide for the selection of presidential electors by districts under Article II of the federal Constitution, is instructive. The question here presented was not directly considered, but the power of the legislature under that article was discussed at length. In the opinion, Mr. Chief Justice Fuller quotes approvingly the language employed by Senator Morton, chairman of the committee on privileges and elections, in a

report presented by him to the senate relating to the power of the legislature to provide for the selection of such electors, in which it is said:

> This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state Constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state Constitution, to choose electors by the people, there is no doubt of the right of of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. Senate Rep. 1st Sess. 43 Cong. No. 395.

In Watson Const., Vol. 2, page 1310, the writer says:

> Whether an amendment is proposed by congress, or by a convention, it is ratified or rejected by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly. The people have to direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted.

Several of the state courts of last resort have had occasion to pass on this question. In *State v. Howell*, 181 Pac. 920, the Supreme Court of Washington, by a divided court, held that the resolution of ratification was subject to the deferendum provisions of the state Constitution. In *Hawke v. Smith*, ——— Ohio ———, there was a similar holding, one of the justices dissenting therefrom. On the other hand, the Supreme Court of Maine in In Re Opinion of the Justices, 107 Atl. 673, decided otherwise. It was therein said:

> Here, again, the state legislature in ratifying the amendment, as congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the senate alone, or the house alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote.

The same view was taken in *Herbring v. Brown* (Or.), 180 Pac. 328. Our attention is also called to the decision of the district court of Lancaster county, Nebraska, supporting relators' contention, and that of the United States District Court, for the northern district of California, in which the opinion of the Maine judges is quoted approvingly and followed.

The people in any state may, in their Constitution, reserve to themselves the right to initiate and defeat state legislation by their vote. To the extent and in the manner therein provided they, acting in conjunction with the legislature, constitute the law-making power of the state. Each state, however, can participate in amending the federal Constitution only in the manner provided therein. If the people want to secure the right to ratify amendments by popular vote thereon, they may do so by an amendment which shall so provide, but such power rests only in the people themselves and should not be usurped by the courts through a judicial interpretation of the instrument itself.

It is our conclusion that the word "legislature," as em-

ployed in Article V, of the federal Constitution, was intended by its framers to mean the representatives of the people, elected to make the laws of the several states, when acting as a body, and that a state has no power through its Constitution or by statute to restrict this action of the legislature subjecting it to a review by popular vote.

2. Under the referendum provision of our state Constitution, the people reserve to themselves the right "to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds." Is the ratifying resolution an "act" within the meaning of this provision?

The construction to be placed on it should not be technical. This court should give effect to the purposes indicated by a fair interpretation of the language used. At the same time, we must bear in mind that it is to be presumed that the framers of the Constitution employed words in their natural sense. The word "act," when employed in legislation, has had a well defined meaning since our first Constitution was adopted. When a proposed law is introduced in the legislature, it is called a "bill." When the bill is passed and approved and becomes a law, it is called an "act." The clause by which it is given life and effect uniformly reads: "The people of the State of Michigan enact." As pertaining to legislation, "act" defined by Bouvier, Vol. I (Rawle's Ed.), page 79, as—"A statute or law made by a legislative body." These applications, "bill" and "act," are frequently used in our state Constitution: "Every bill shall be read three times in each house before the final passage thereof." Section 23, Article V. "Every bill passed by the legislature shall

be presented to the governor before it becomes a law." Section 36, Article V. "No act shall take effect or be in force until the expiration of ninety days, etc." Section 21, Article V. "No local or special act shall take effect until approved by a majority of the electors, etc." Section 30, Article V. Section 38 reads:

> Any bill passed by the legislature and approved by the governor, except appropriation bills may be referred by the legislature to the qualified electors; and no bill so referred shall become a law unless approved by a majority of the electors voting thereon.

Such laws are referred to in Section 1 or Article V, as "Acts adopted by the people."

It thus appears that the framers of the Constitution, by the use of the word "act" in Article V, had in mind a statute or law passed with the formality required by the Constitution and approved by the governor. It is suggestive that while, under the provision of the Constitution relied on, the people using the initiative have "the power to propose legislative measures, resolutions and laws," the power under the referendum is limited "to approve or reject at the polls any act passed by the legtion for a referendum on the actio nof the legislature could islature, except, etc." While an amendment to the Constitution, after ratification by a sufficient number of states, becomes a part thereof and is thereafter the supreme law of the land, the action of the state legislature in ratifying it is not the making of a law or an "act" as understood in legislative parlance.

This question has been considered by the following courts: In *Moulton v. Scully*, 111 Me. 428, that court says:

> The referendum applies and was intended to apply only to acts or resolves of this class, to every bill or resolution having the force of law, that is, to what is commonly known as legislative acts and resolves, which are passed by both branches, are usually signed by the governor and are embodied in the legislative acts and resolves, as printed and published.

In In re Opinion of the Justices, 107 Atl. Rep. 673, the same court says:

> This resolution, ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article 5 of the federal Constitution to perform that particular act.

See also, *Hopping v. Richmond*, 170 Cal. 605 (150 Pac. 977); *Herbring v. Brown* (Or.), 180 Pac. 328; *Whittemore v. Terral*, (Ark.), 215 S. W. Rep. 686.

To the contrary, see *State v. Howell, supra.* The decision of the Ohio Supreme Court in *Hawke v. Smith, supra,* has no bearing on the question as the Constitution of that state expressly provides for a referendum on the action of the general assembly in ratifying any such proposed amendment.

It follows that the respondent was justified in refusing to act on the petition for a referendum, and the writ of mandamus is denied without costs.

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BRIEF OF PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 601

GEORGE S. HAWKE,
Plaintiff in Error,
v.
HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(27356)

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Supreme Court of the United States

OCTOBER TERM, 1919.

GEORGE S. HAWKE,
Plaintiff in Error,
v.
HARVEY C. SMITH,
As Secretary of the State of Ohio,
Defendant in Error.

No. 601.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OF THE CASE.

This case is in this Court upon a writ of error duly allowed by the Chief Justice of the Supreme Court of the State of Ohio. (R. 4.)

It is an action by the plaintiff in error, George S. Hawke, as a citizen, taxpayer and an elector of the State of Ohio, to enjoin the defendant in error, Harvey C. Smith, as Secretary of the State of Ohio, from submitting to the electors of the State of Ohio, at the election to be held in November, 1920, a referendum on the action of the General Assembly of the State of Ohio ratifying the Amendment proposed by the Sixty-sixth Congress of the United States to the Constitution of the United States providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of sex," popularly known as the Woman Suffrage Amendment; and from expending any money out of the public funds of the State of Ohio in preparing and having printed forms of ballot for the submission of said referendum on said act of said General Assembly, and from spending any money out of the public funds of said State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal. (R. 18.)

The case was filed in the Court of Common Pleas in Franklin County, Ohio. (Amended petition, R. 14.)

The defendant demurred to the amended petition upon the ground that the facts alleged in said petition are not sufficient to constitute a cause of action and that the Court had no jurisdiction of the subject matter. (R. 19.)

The Court found that the demurrer was well taken and should be sustained. The plaintiff refusing to plead further, the case was dismissed and judgment rendered against the plaintiff for costs. (R. 13.)

A proceeding in error was taken from the Common Pleas Court of Franklin County to the Court of Appeals of said County in which Court the judgment of the Court of Common Pleas was affirmed. (R. 11.)

From this judgment the plaintiff went to the Supreme Court of the State of Ohio on a petition in error assigning as errors:

1. That the Court of Appeals erred in rendering judgment affirming the judgment of the Court of Common Pleas.

2. That the Court of Appeals erred in its judgment that there was no error in the judgment and proceedings in the Court of Common Pleas.

3. That the Court of Appeals erred in rendering judg-

ment against the plaintiff affirming the judgment of the Court of Common Pleas. (R. 9.)

The Supreme Court of the State of Ohio affirmed the judgment of said Common Pleas Court and of said Court of Appeals. (R. 8.)

Thereupon the plaintiff filed his petition praying for the allowance of a writ of error to the Supreme Court of the United States and filed therewith his assignments of error, which writ of error was duly allowed. (R. 2, 3.)

Writ for order for allowance of writ of error was duly issued by Hon. Edward D. White, Chief Justice of United States. (R. 4, 5.)

The questions at issue in this Court arise on the judgment of the Supreme Court of Ohio affirming the judgment of the Court of Appeals of Franklin County, Ohio, and the judgment of the Common Pleas Court of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error and involve the validity of the provisions of the Ohio State Constitution permitting the holding of a referendum election by the electors of that State on the act of the General Assembly of the State of Ohio ratifying an Amendment to the Constitution of the United States duly proposed by the Congress of the United States.

The provisions of the Ohio Constitution under which the referendum election is sought, are as follows:

> "Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> "No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is pro-

> vided for a referendum on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."
>
> Ohio Const., Art. 2, Secs. 1 and 1a.

The plaintiff in error alleges in his amended petition, filed in the Common Pleas Court of Franklin County, and here raises and urges the invalidity of the foregoing provision of the Ohio State Constitution on the ground that it is in conflict with Article V of the Constitution of the United States providing for the amendment of that instrument and which reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of the several states, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-

> fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any Manner affect the first and fourth clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The plaintiff also alleged in his petition, filed in said common pleas court, and here raises and urges, the invalidity of said referendum provision in the constitution of said state on the ground that such provision is in contravention of the provisions of the Ordinance of 1787 providing as a part of the compact therein that the states formed out of the Northwest Territory should have a republican form of government, in that such referendum provision violates the essential principles of republican or representative form of government, and that said referendum provision of the constitution of said state violates the provision of the Deed of Cession of 1784, from the State of Virginia to the United States, of the Northwest Territory and the provisions of the Virginia Act of Ratification of 1788, ratifying the act of Congress accepting the said cession of said territory and the provisions of the Enabling Act of Congress authorizing Ohio to elect representatives to form a constitution and frame a government which provided that such government shall be republican in form and not repugnant to the provisions of the Ordinance of 1787, and as accepted by the people of the state of Ohio in the preamble to the Ohio state constitution of 1802, and of the act of congress of 1803 admitting Ohio into the Union as a state and ratifying the republican form of government created by the constitution of Ohio of 1802.

ERROR RELIED UPON.

The error relied upon in this court is the action of the Supreme Court of Ohio in affirming the judgment of the Court of Appeals of Franklin County sustaining the judgment of the Court of Common Pleas of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error filed in said Court of Common Pleas and in dismissing said petition and rendering judgment against the plaintiff in error for costs.

POINTS OF LAW AND AUTHORITIES RELIED UPON.

1.

The amendment of the Federal Constitution as to substance, form and manner is exclusively a Federal question and the right to participate therein is derived from and dependent upon the Federal Constitution.

a. Article V, Federal Constitution;
b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

2.

The Constitution of the United States provides the manner of its own amendment and the degree and manner in which the several states may participate therein.

a. Article V, Federal Constitution;

b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

3.

The word "legislature" as used in Article V of the Federal Constitution, means the general assembly of a state or representative law making body chosen by the people.

a. Black on Interpretation of Laws, pages 15 and 16;
b. *Walker v. City of Cincinnati*, 21 O. S., 14 (53);
c. *State ex rel., etc. v. Hildebrand*, 241 U. S. 565;
d. Art. 1, Sec. 4, Paragraph 1, Federal Constitution;
e. Art. 1, Sec. 3, Paragraphs 1 and 2, Federal Constitution;
f. Willoughby on the Constitution, p. 20, Sec. 20;
g. Art. 1, Sec. 2, Paragraph 1, Federal Constitution;
h. Art. 11, Sec. 1, Paragraph 2, Federal Constitution;
i. 17th Amendment, Federal Constitution;
j. Report of Committee of U. S. Senate on Privileges and Elections in re Contest of Charles J. Faulkner, W. Va., 1888, confirmed by Senate;

k. Recent Wisconsin Supreme Court case interpreting Sec. 3 of Art. 1, of Federal Constitution;

l. *State v. Frear*, 125 N. W., 961;

m. Art. IV, Sec. 3, Paragraph 1, Federal Constitution;

n. Art. IV, Sec. 4, Federal Constitution;

o. The Federalist.

p. Four Elliott's Debates, 2nd ed. 182, 183;

q. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;

r. Art. 6, Federal Constitution.

4.

The history of the Constitutional Convention and a study of its debates and those of the state conventions ratifying the Federal Constitution and the general acceptance, use and understanding of the word "legislature" at the time of the formulation and adoption of the Constitution, conclusively show that the makers of the Constitution intended to delegate the power of ratification to the general assemblies or representative law making bodies of the several states composed of members elected by the people of such states.

a. Declaration of Independence;

b. Articles of Confederation;

c. Adams' Works, Vol. —, p. 508;

d. Proceedings of Constitutional Convention, 1787;

e. Madison's Journal, pp. 97, 111, 112, 199, 200, 365, 388, 410-416, 419, 421, 435 and 542;

f. *McPherson v. Blacker*, 146 U. S., 1 (28);
g. Journal Cons. Conv., pp. 92, 190, 286 and 288;
h. Elliott's Deb., Vol. 1, pp. 156, 208, 211, 217 and 262;
i. 6 A. & E. Encycl. of L., 2d Ed., p. 906, 6 (bb), n. 3;
k. Cooley on Cons. Limitations, p. 600;
l. Watson on the Constitution, pp. 318, 319 and 320;
n. *City of Chicago v. Reeves*, 77 N. E., 237; 220 Ill., 274 (288);
o. *Western v. Ryan*, 97 N. W., 347; 70 Neb. 211 (218);
q. *State v. Cox*, O. L. R., Jan. 27, 1919, p. 475 of "Federal Decisions";
r. Art. IV, Sec. 3, Federal Constitution;
s. *Hollingsworth v. Va.*, 3 Dall., 378;
t. Elliott's Journal, Constitutional Convention, 145, 182, 149, 223, 230, 304 and 317;
u. Elliott's Debates, Vol. 3, pp. 49, 96, 97;
v. Four Elliott's Debates, 2nd Ed. 182, 183;
w. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289.

5.

Ratification of an Amendment to the Federal Constitution is not a legislative act. The power of ratification is derived from Federal and not from State authority.

a. Art. 1, Sec. 4, Federal Constitution;
b. *State ex rel., etc. v. Hildebrant*, 241 U. S., 565;
c. *McPherson v. Blacker*, 146 U. S., 1;

d. Opinion Ohio Attorney General, 1917, as to meaning of "legislature" in Art. V, Federal Constitution;
e. Elliott's Debates, Vol. 4, pp. 177 and 404;
f. 65 O. L., 280; 66 O. L. 424; 103 O. L. 974;
g. 15 U. S. S. at L. 706, and 16 U. S. S. at L. 1131;
h. Mathews' Legislative and Judicial History of the 15th Amendment, p. 68;
i. Jameson, Cons. Conv., (4th Ed.), Sec. 583;
j. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
k. In re Opinion of Justice, 107 Atl. (ME.), 673;
l. *State ex rel Morris v. Mason*, 43 La. Ann. 590, 9 So. 776;
m. *Commonwealth ex rel. Atty. Gen. v. Grist*, 196 Pa. State 396, 46 Atl. 505;
n. *Hollingsworth v. Virginia*, 3rd Dall. (U. S.) 378;
o. Willoughby, Const., 520, 521;
p. 2nd Watson, Const. 1318.

6.

The people of a state cannot reserve the power to act in the matter of ratification of an amendment to the Federal Constitution because the states delegated all authority to amend the Federal Constitution to the Federal Government and now possess no power of ratification other than such as has been re-delegated to them by the Federal Government and are limited in the exercise of any such re-delegated powers to the manner and form

and the agencies designated by the Federal Government in the National Constitution. The states can not reserve what they do not possess.

a. Part of Sec. 1, Art. II, Ohio Constitution, adopted Nov. 5, 1918;
b. 10th Amendment of Federal Constitution;
c. Art. V, Federal Constitution;
d. Jameson Cons. Conv., (4th Ed.), Sec. 583;
e. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
f. In re Opinion of Justice, 107 Atl. (ME.), 673;
g. *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So., 776;
h. *Commonwealth ex rel. Atty. Gen. v. Grist*, 196 Pa. State 396, 46 Atl. 505;
i. *Hollingsworth v. Virginia*, 3rd Dall. (U. S.) 378;
j. Willoughby, Const. 520, 521;
k. Second Watson Const. 1318.

7.

Under the Constitution, Congress alone may choose the mode of ratification and is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

a. U. S. Constitution, Art. V.;
b. U. S. Constitution, Sections 8 and 18, Art. 1;
c. Thayer, Legal Essays, 7-13;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 290.

e. Proclamation of U. S. Sec. of State, Jan. 29, 1919, and like proclamations proclaiming the ratification of former amendments.

11.

The Federal Constitution is the supreme law of the land, and as such, the courts are bound to support it. Any provision in a state constitution in conflict with or in contravention of the Federal Constitution is void.

a. Art. VI, Federal Constitution;
b. *Hauenstein v. Lybham*, (1879), 100 U. S. 483; 25 U. S. (L. Ed.), 628;
c. *Montgomery v. State*, (1908), 55 Fla. 97, 45 So., 879;
d. Minority opinions of court in recent Washington case similar to present case;
e. Jameson, Cons., Conv., 4th Ed., Sec. 583;
f. *State ex rel. Schrader v. Polley, etc.*, 26 S. D., 5;
g. *State ex rel. Davis v. Hildebrant*, 94 O. S. 154, 241 U. S. 565;
h. Art. 1, Sec. 4, Federal Constitution;
i. *State ex rel. Case v. Howell, etc.*, 85 Was. 281 and 294;
j. Amendment XXXI of Art. IV, Maine Constitution;
k. Art. V, Federal Constitution;
l. *Hollingsworth v. Va.*, 3 Dall., 378;
m. *State v. Dahl*, (N. D.), 34 L. R. A., 97;
n. Preamble, Federal Constitution;
o. *Chisholm v. State*, 2 Dall., 419;
p. *Martin v. Hunter's Lease*, 1 Wheat., 304, 325;

q. 4 Elliott Deb., 176, 177;
r. *Dodge v. Woolsey*, 18 How., 331, 348;
s. Watson on Const., Vol. 2, pp. 1310 and 1315;
t. *Moulton v. Soully*, 111 Maine, 438, 446;
u. *Horbring v. Brown*, 180 Pac. Rep., 328;
v. U. S. Rev. Stat., Sec., 205;
w. Appendix, Part 2, U. S. Stat., 3rd Session, 65th Congress, 1918, 1919.

12.

The Ordinance of 1787 consists of three parts: First. The titles to estates. Second. Sections relating to temporary matters. Third. Six fundamental articles of compact expressly made permanent, to remain forever unalterable.

Letter of Nathan Dane, Proceedings of Massachusetts Historical Society;
Virginia Resolution of Cession, Hening's Statutes, Va., v. 10, p. 564;
Virginia Act of Cession, Hening's Statutes, Va., v. 11, p. 326;
Act of Confederation Congress, September 13, 1783, Journal 8, pp. 254-260;
Virginia's Deed of Cession, Hening's Statutes, Va., v. 11, p. 571;
Confederation Congress Revision, Act of Cession, July 7, 1786;
Ordinance of 1787, 1 L. U. S. 475;
Modified Cession of Virginia, Hening's Statutes, Va., v. 12, p. 780;
Act of Congress, Ohio Territory, United States Statutes-at-large, Chap. 8, p. 50;

Congressional Enabling Act for Ohio, United States Statutes-at-large, v. 2, p. 173;

Convention Ordinance by Ohio Delegates;

Constitution of Ohio;

Act of Congress Recognizing State of Ohio, United States Statutes-at-large, v. 2, p. 201;

Article 6, Constitution of the United States;

Hutchinson v. Thompson, 9th Ohio 62.

13.

That part of the Ordinance of 1787 containing the covenant or compact between the State of Virginia, the National Government and the people of the Northwest Territory, is still alive and binding upon the people inhabiting the states carved from such territory and upon the states themselves, and any provision in the Constitution of any one of such states in conflict with the provisions of the Ordinance is void.

Hogg v. Zanesville, 5 Ohio 416;

Betts v. Wise, 11 Ohio 219;

Hutchinson v. Thompson, 9 Ohio State 62;

Lyon v. Lyon, 1 O. C. C. (N. S.), 246;

Cochran's Heirs v. Loring, 17 Ohio 425;

State v. Boone, 84 O. S. 346;

Cox v. State, 3 Blackford, (Indiana) 193;

Spooner v. McConnell, 1 McLean 337;

Palmer v. Commissioners, 3 McLean 226;

Vaughan v. Williams, 3 McLean 530;

Jolly v. Terre Haute, 6 McLean 235;

Williams v. Beardsly, 2 Ind. 596;

Depew v. Wabash, 5 Ind. 8;

Henthorn v. Doe, 1 Blackf. 157;
Giddings v. Blackner, 52 N. W. 946;
Phoebe v. Jay, 1 Breese 268;
Milwaukee v. Schooner, 23 Wis. 144;
Wisc. v. Lyons, 30 Wis. 61;
Atty. Gen. v. Eau Claire, 37 Wis. 400.

14.

The referendum provision in the Ohio Constitution is invalid, being in contravention of the compact between the State of Virginia, the United States, and the people of the Northwest Territory, under which the State of Virginia ceded that territory to the United States, with the covenant that the States formed from said territory should "be distinct republican states."

Virginia Resolution of Cession, Hening's Statutes, Va., v. 10, p. 564;

Virginia Act of Cession, Hening's Statutes, Va., v. 11, p. 326;

Act of Confederation Congress, September 13, 1783, Journal 8, pp. 254-260;

Virginia's Deed of Cession, Hening's Statutes, Va., v. 11, p. 571;

Confederation Congress Revision, Act of Cession, July 7, 1786;

Ordinance of 1787, 1 L. U. S. 475;

Modified Cession of Virginia, Hening's Statutes, Va., v. 12, p. 780;

Act of Congress, Ohio Territory, United States Statutes-at-large, Chap. 8, p. 50;

Congressional Enabling Act for Ohio, United States Statutes-at-large, v. 2, p. 173;

Convention Ordinance by Ohio Delegates;
Constitution of Ohio;
Act of Congress Recognizing State of Ohio, United States Statutes-at-large, v. 2, p. 201;
Article 6, Constitution of the United States.

15.

Injunction against the calling of a referendum election on the act of the Legislature of a state ratifying an amendment to the Federal Constitution is a proper remedy and may be invoked by a citizen who is a taxpayer and an elector.

a. *State v. Superior Court*, 92 Was., 16, 159 Pac. Rep., 92;
b. *State v. Alcott*, 62 Oreg., 277, 125 Pac. Rep., 303;
c. *Rickey v. Williams*, 8 Was., 479, 36 Pac. Rep., 480;
d. *Kricachel v. Com.*, 12 Was. 428;
e. *State v. Roach*, 230 Mo., 408;
f. *Crawford v. Gilchrist*, 64 Fla., 41, 59 So. 964;
g. *State v. White*, 36 Nev., 334, 136 Pac. Rep., 110;
h. *Spear v. People*, 52 Col., 325, 122 Pac. Rep., 768;
i. Professor Dodd on Division and Amendment of State Constitutions, p. 232;
j. *Ellingham v. Dye*, 172 Ind., 336;
k. *State v. Hall*, 35 N. Dak., 34, 159 N. W., 281;

l. *Mayer v. Hughes*, 36 S. E., 247, 110 Ga., 804;

m. *De Kalb v. Atlanta*, 65 S. E., 72, 132 Ga., 727;

n. *Tolbert v. Long*, 67 S. E., 826, 134 Ga., 292;

o. *Lynchburg v. Com.*, 109 N. C., 159;

p. *Hood v. Sutton*, 94 S. E., 686;

q. *International Trading Stamp Co. v. Memphis*, 101 Tenn., 181, 47 Southwest, 136;

r. *Layton v. Mayer*, 23 South, 99;

s. *Brown v. Trousdale*, 138 U. S., 389, 11 Sup. Court, 308.

BRIEF OF ARGUMENT.

1. Authority to Amend the Federal Constitution is Federal and not State.

There is but one authority, by or under which, an amendment to the Federal Constitution can be made. That authority is Federal, and not state. It is found in Article V of the Federal Constitution. In it alone—within these lines and not elsewhere:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments; which, in either case, shall be valid, to all intents and purposes, as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress: Provided, That no amendment, which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Eighteen amendments have been made to the Constitution since its adoption—a period of one hundred and thirty-one years—another, the one at bar, has been proposed and is now pending—all originating in the Congress by resolution, adopted by a two-thirds vote of both branches, House and Senate, submitted to the "Legislatures of the several States," and ratified by the "Legislatures of three-fourths of the several States."

The Amendment at bar—the Suffrage Amendment—is in process of adoption by the same procedure.

In every instance the States have acted by and through their Legislatures or General Assemblies—bodies composed of members elected by, and representative of, the people, and usually, though not exclusively, by joint resolutions passed by each House of the several Assemblies and certified without executive signature or approval. This has been the procedure and form for one hundred and thirty-one years during which there have been established eighteen precedents without an exception or a break in the line. No attempt at Amendment has ever been made in any other or different form or manner, either the amendment at bar and the one immediately preceding it—the Eighteenth, or Prohibition Amendment, and then only by a few states where it is claimed the act of ratification is not complete with the action of the General Assembly until its act of approval is confirmed by referendum election by the state's qualified electors.

Among the States challenging the right of the Legislature to ratify in conformity with the provisions of Article V of the Constitution and with the precedents of a century and a third, is the State of Ohio, where by an amendment to the State Constitution adopted in November, 1918, it provided:

> Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided by a referendum petition on laws

passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification of the General Assembly, ordering that such ratification be submitted to the electors of the states for their approval or rejection, in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of the Article on the subject of the referendum upon laws passed by the General Assembly shall apply thereto, as far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency and not subject to the referendum.

Here, we submit, is an attempt by a State and its people to reserve to itself a power which they do not possess. Upon admission into the Union, the State of Ohio and its people parted with their legal sovereignty in the matter of making amendments to the Federal Constitution and shifted that sovereignty to the people of the United States, or, as has been said more exactly, to "the States' Government as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."

As suggested in the Harvard Law Review for December, 1919, hereinbefore cited, "Article V itself accomplished this shift of sovereign power, and by its provisions the Constitution may be amended in spite of the unanimous vote of the people of any one state, and an amendment proposed by the unanimous vote of the people in one state can not become 'The Supreme Law' of that state un-

less it be approved by sufficient sister states to total three-fourths of the then existing states."

But notwithstanding this fact, the people of Ohio, by the referendum provision in their Constitution, are attempting to reserve to themselves the power to arrest and set aside the process of ratification provided by the Constitution—a power with which they parted the day they entered the Union and do not now possess—not having it, they can not reserve it.

It is an instance where a State in its Constitution declares that no ratification by the General Assembly "shall go into effect until ninety days after it shall have been adopted by the General Assembly" while the Constitution of the United States declares that ratification shall be effective, so far as Ohio is concerned, the moment affirmative action by the Legislature is taken and that the moment three-fourths of the Legislatures of the several States have taken like action the Amendment "shall be valid, to all intents and purposes," that is, shall be effective, so effectually effective that the State, neither through the action of its legislature nor otherwise, can recall its act.

They are suspending the act of ratification of their State Legislature not only for ninety days, but where a referendum petition is filed within ninety days, "until and unless" such act of ratification is "approved by a maority of those voting" in the referendum election, whereas the Constitution of the United States makes ratification effective, "to all intents and purposes," upon ratification "by the Legislatures of three-fourths of the several States."

If, in the present instance, the Legislature of Ohio were the thirty-sixth Legislature ratifying the amendment at bar, the Constitution of the United States and the laws

enacted by the Congress of the United States in the exercise of a power unquestionably lodged in it would declare the amendment "ratified to all intents and purposes," but the referendum clause in the Ohio Constitution would suspend ratification not only in Ohio, but throughout the Union, for a period of ninety days, notwithstanding the National Constitution and the laws of Congress. A small per cent. of the people of Ohio—six per cent.—by the filing of a petition with the Secretary of State for a referendum election on the action of ratification by the State Legislature would suspend ratification and the taking effect of the amendment "until and unless" such act of ratification was "approved by a majority of those (the electors of Ohio) voting in the referendum election."

The letter and the spirit of the Constitution and the precedents of a century and a third are against the attempt, but that they may be justified and bring their act within the grant of ratifying power expressed in Article V of the Constitution, they insist upon a strained and forced construction of the letter of that great Instrument, claiming for the word "Legislature" as used therein, a meaning utterly foreign to the context, to the unbroken legislative and executive precedents of interpretation and to the mind and thought of the men who formulated the Constitution and the Convention that adopted it. They interpret the word to mean "the law-making power" of each state, amending, by interpretation, the Constitutional letter to read, "when ratified by the law-making power of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress." The interpellation of the words the "law-making power" instead of the

Legislatures, of three-fourths of the States in the context of the Constitutional provision, discloses of itself such an incongruity as to preclude its acceptance. It convicts the framers of the Constitution of delegating the power of ratification in one instance, not to an entity of well-defined character—a body composed of delegates or members—but to a vote of the proletariat, and in the next instance, and in the same sentence, of delegating such power of ratification to a convention composed of delegates or members—a convention without any legislative power whatever. Such inconsistency and diversions of thought and purpose cannot, we think, be justly imputed to minds like those who framed and adopted this great National pact.

In this clause in the Ohio constitution, the power to ratify amendments, granted directly by the National Constitution, is to be taken away from the Legislature, or at least made subject to revocation by a plebiscite. If permitted, it will amount to a nullification of the provisions of the Constitution and destroy its integrity. It is unthinkable that a single state may reserve power delegated by the whole people to the Federal Government when the Constitution was formed. Neither the people of the State nor those of the Nation have ever had the right to participate directly in the matter of ratification of a Federal Constitutional Amendment. It is important in this behalf to remember that the authority to ratify, redelegated by the National Government, is not bestowed upon the State or upon the people of the State, but upon the Legislature—a known and recognized agency or entity. Justices Parker and Mitchell, in the dissenting opinion in the Oregon case, *State v. Howell, supra*, put it well:

> It is therefore plain that the above-quoted portion of the Fifth Article of the Federal Constitu-

> tion is the supreme law of the land, touching the subject of amending that instrument. The several States, by the expressed provisions of that Article, have as completely surrendered the power to prescribe a different manner of amending the Federal Constitution as they have surrendered to the Federal Government the sovereign powers enumerated in that instrument to be exercised by the Federal Government * * *.
>
> I am convinced that the ratification by the State Legislature of a proposed amendment to the Federal Constitution is an exercise of a power which the Legislature possesses by virtue of the Fifth Article of that instrument, and that designation by Congress of the method of ratification in pursuance of the power given to Congress by that Article, and that the Legislature is not acting in pursuance of that power given it by the State Constitution, except in so far as the Legislature may owe its existence to the State Constitution.

In Jameson, Constitutional Conventions (4th Ed.), Sec. 583, it is said:

> The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power it could not assume under any notion of a general right to legislate, for that right is confined to state limits, and to the enactment of ordinary laws.

The Supreme Court of Maine, in an advisory opinion handed down at the request of the Governor, in *In re Opinion of Justices*, 107 Atl., 673, declares:

> The people through their constitution might have clothed the senate alone, or the house alone, or the governor's council or the governor with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves but conferred it completely upon the two houses of the legislature, that is the legislative assembly. * * *

> It admits of no doubt that in the matter of amendment, which is governed by Article V, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions.

In volume 2, p. 1310, of Watson's Constitutional Law, it is said:

> Whether an amendment is proposed by Congress **or by a convention**, it is ratified or rejected by the representatives of the people either in the legislature, or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted.

The Maine court held in the opinion cited above that the people of the State of Maine had completely and unreservedly lodged their power over amendments with the bodies designated in Article V, and had no power left in themselves either to propose or to ratify federal amendments, declaring, "the authority is elsewhere."

The weight of authority in behalf of the contention we make is overwhelming; indeed, with the exception of the Washington case, *State v. Howell*, *supra*, there are no other or adverse precedents.

2. The history of Article V, and the use and understanding of the word "Legislature" at the time of the formulation and adoption of the Federal Constitution, utterly preclude the "legislative power" interpretation or theory.

The history of the times, of Article V, and of the Constitution Convention and its debates, and those of the state conventions called to ratify the Constitution, and the

general understanding of the meaning of the word "legislature" and the use that was then made of it, conclusively show that by the use of the word in Article V the framers of the Constitution intended to delegate the power of ratification of amendments to the general assemblies of the respective states—their representative law-making bodies composed of delegates or members elected by the people.

Immediately after the Declaration of Independence, the Continental Congress passed a resolution recommending that each of the thirteen states adopt a state constitution suitable to its own needs. In pursuance of that resolution the state of Virginia adopted a state constitution, early in 1776, in which it was declared:

> We ordain and declare the future form of government to be as follows: The legislative, the executive, and the judiciary departments shall be separate and distinct. The legislature shall be formed of two distinct branches, which together shall be a complete legislature.

In that there was no room for the referendum, or for the "legislative power" theory of a legislature plus the body of the electors.

The next year a constitutional convention sat in New York and framed a constitution, written by John Jay, the first Chief Justice of this high Court, and the foremost lawyer of his time, in which it was provided:

> This convention, in the name and by the authority of the good people of this State, ordain and determine and declare, that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men who together shall form the Legislature.

During the Revolutionary period every other of the thirteen states, except two—Rhode Island and Connecticut—

formulated and adopted similar state Constitutions, and the two that did not do so, did not, only because they already had similar bodies under their charters.

Because of these years of debate and constitution making, the word legislature had come to have a fixed and definite meaning among statesmen and public men and by the public itself. It meant an assembly of two houses whose members were elected by the people and were their delegates or representatives. It meant that, and only that. There was no thought of a legislature constituted of an assembly plus the people.

If there had been no debates in the Constitutional Convention or in the conventions called to ratify the Constitution, on the subject at all, the meaning of the word in the minds of the framers of the Constitution and their understanding of the entity they were designating in Article V, as the ratifying agency of the several states, would have been convincingly apparent. But there were debates both in the Constitutional convention and in the ratifying conventions, and these debates make the matter conclusively clear. There is no ambiguity, uncertainty or doubt.

Take first the history of Article V in its progress through the Convention from its first introduction until it finally found its place in the Constitution in its completed form.

It first appeared in the resolutions offered by Edmund Randolph, May 29, 1787, and read as follows:

> 12. Resolved, That provision ought to be made for the amendment of the articles of Union, whensoever it shall seem necessary; and that assent of the national legislature ought not to be required thereto.
>
> Elliott's Journal, 145.

On June 19th, the Committee of the whole house re-

ported the Randolph resolutions as altered, amended and agreed to in the committee, with the following provision as to amendment:

> 17. Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 182.

On May 29th, Charles Pinckney presented a draft of a federal government, the Sixteenth Article of which provided:

> If two-thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the constitution. Or should Congress, with the consent of two-thirds of each house, propose to the states amendments to the same, the agreement of two-thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the constitution.
>
> Elliott's Journal, 149.

On July 26th, the resolutions of the convention were referred to a committee of detail composed of Messrs. Rutledge, Randolph, Gorham, Ellsworth and Wilson, for the purpose of reporting a constitution, the Nineteenth Article of which reads:

> Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 223.

On August 6th, the Committee of Detail reported a draft of the constitution, the Nineteenth Article of which provided:

> On the application of the legislatures of two-thirds of the states in the Union for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.
>
> Elliott's Journal, 230.

Subsequently, a Committee of Revision was appointed and the tentative draft was referred to it. On September 12th, the Committee reported a revised draft in which appeared the following:

> Art. V. The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the —— and —— sections of article ——.
>
> Elliott's Journal, 304.

On September 15th, Art. V was amended and given its present form, to-wit:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: **Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the 1st and 4th clauses in the 9th section of the 1st article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.**
>
> Elliott's Journal, 317.

Immediately thereafter, the question to agree to the Constitution as amended was put and carried in the affirmative, all the States concurring, and the instrument was engrossed.

This history of the evolution of the amendatory clause, is of itself convincing evidence that those who formulated it had in mind the designation of a ratifying agency in each of the several states definite and well understood—a state assembly or representative body, to be, as Congress might determine, the legislature or law-making body of the state, according to the meaning of the word "legislature" as then understood and accepted, or a special delegated body to be known as a convention.

Take next the debates in the conventions, national and state:

The national Convention met on May 14th, 1787. On May 29, as we have already seen, Edmund Randolph, a delegate from Virginia and the Governor of that state, laid before the Convention certain resolutions, one of which, the fifteenth, was as follows:

> That the amendments which shall be offered to the confederation by the convention ought at the proper time, or times, after the approbation of congress, to be submitted to an assembly or assemblies of representatives, to be expressly chosen by the people to consider and decide thereon.

The resolution proposed by Mr. Randolph, was considered by the convention on June 5. (Madison's Journal 111, 112.):

> Mr. Sherman thought such a popular ratification unnecessary; the articles of confederation providing for changes and alterations, with the assent of congress, and ratification of state legislatures.
>
> Mr. King, supposed that the last articles of confederation rendered the legislature competent to

> the ratification. The people of the Southern states, where the Federal articles had been ratified by the legislatures only, had since, impliedly given their sanction to it. He thought, notwithstanding, that there might be policy in varying the mode, a convention being a single house, the adoption may more easily be carried through it, than through the legislatures, where there are several branches. The legislatures, also, being to lose power, will be most likely to raise objections. *The people having already parted with the necessary powers*, it is immaterial to them by which government they are possessed provided they be well employed. (Italics ours.)

Again, on June 20, Mr. Ellsworth of Connecticut observed (Madison's Journal, 199-200):

> He wished also, the plan of the convention to go forth as an amendment of the articles of the confederation, since under this idea the authority of the legislatures could ratify it. If they were unwilling, the people will be so too. If the plan goes forth to the people for ratification, several succeeding conventions within the states would be unavoidable. He did not like these conventions that were better fitted to pull down than to build up constitutions.
>
> Mr. Randolph did not object to the change of expression, but apprised the gentlemen who wished for it, that he did not admit it for the reasons assigned; particularly that of getting rid of reference to the people for ratifications.

Apparently, Mr. Ellsworth was not yet satisfied with the idea of ratifying the new constitution by convention, for upon June 23rd he moved that it be referred to the legislatures of the states for ratification.

We quote from Mr. Madison's Journal again (pp. 410-416):

> Colonel Mason considered a reference of the plan to the authority of the people, as one of the

most important and essential of the resolutions. *The legislatures have no power to ratify it. They are the mere creatures of the state constitutions*, and cannot be greater than their creators. And he knew of no power in any of the constitutions —he knew there was no power in some of them —that could be competent to this object. Whither, then, must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished, as the basis of free government. Another strong reason was, that *admitting the legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding legislatures, having equal authority, could undo the acts* of their predecessors; and the National government would stand in each state on the weak and tottering foundation of an act of assembly. There was a remaining consideration, of some weight. In some of the states the governments were not derived from the clear and undisputed authority of the people. This was the case in Virginia. Some of the best and wisest citizens considered the constitution as established by an assumed authority. A National constitution derived from such a source would be exposed to the severest criticisms." (Italics ours.)

Mr. Randolph. One idea has pervaded all our proceedings, to-wit, that opposition as well from the states as from individuals, will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext, by the mode of ratifying it? Added to other objections against a ratification by the legislative authority only, it may be remarked, that there have been instances in which the authority of the common law has been set up in particular states against that of the confederation, which has had no higher sanction than legislative ratification. Whose opposition will be most likely to be excited against the sytem? That of the local demagogues

who will be degraded by it, from the importance they now hold. These will spare no efforts to impede that progress in the popular mind, which will be necessary to the adoption of the plan and which every member will find to have taken place in his own, if he will compare his own, if he will compare his present opinions with those he brought with him into the convention. It is of great importance, therefore, that the consideration of this subject should be transferred from the legislatures, where this class of men have their full influence, to a field in which their efforts can be less mischievous. It is, moreover, worthy of consideration, that some of the states are averse to any change in their constitution, and will not take the requisite steps, unless expressly called upon, to refer the question to the people.

Mr. Gerry. The arguments of Col. Mason and Mr. Randolph prove too much. They prove an unconstitutionality in the present Federal system, and even in some of the state governments. * * * Both the State government and the Federal government have been too long acquiesced in to be now shaken. He considered the federation to be paramount to any state constitution. The last article of it, authorizing alterations, must consequently be so as well as the others; and everything done in pursuance of the article, must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people. They would never agree on anything. He could not see any ground to suppose that the people will do what their rulers will not. The rulers will either conform to, or influence the sense of, the people.

Mr. Gorman was against referring the plan to the legislatures. 1. Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature who are to lose power which is to be given up to the general government. 2. Some of the legislatures are composed of several branches. It will be

more difficult in these cases to get the plan through the legislatures, than through a convention. 3. In the states many of the ablest men are excluded from the legislature, but may be elected to a convention. 4. The legislatures will be interrupted with a variety of little business; by artfully pressing which, designing men will find means to delay from year to year, if not to frustrate altogether, the national system. 5. If the last article of the confederation is to be pursued, the unanimous concurrence of the states will be necessary. * * * It would, therefore, deserve serious consideration, whether provision ought not to be made for giving effect to the system, without waiting for the unanimous concurrence of the states.

Mr. Ellsworth. If there be only legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as would be competent. He thought more was to be expected from the legislatures, than from the people. * * * It was said by Colonel Mason—in the first place, that the legislatures have no authority in this case; and in the second, that their successors, having equal authority, could rescind their acts. As to the second point he could not admit it to be well founded. *An act to which the states by their legislatures made themselves parties becomes a compact from which no one of the parties can recede of itself.* As to the first point, he observed that a new set of ideas seemed to have crept in since the articles of confederation were established. Conventions of the people or with power derived from the people were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. *To whom have Congress applied on subsequent occasions for further powers? To the legsilatures, not to the people.* The fact is, that we exist at present (and we need not inquire how) as a Federal society united by a charter, one article of which is that alterations therein may be made by the legis

lative authority of the states. It has been said that if the confederation is to be observed, the states must unanimously concur in the proposed innovations. He would answer, that if such were the urgency and necessity of our situation as to warrant a new compact among a part of the states, founded on the consent of the people; the same pleas would be equally valid, in favor of a partial compact, founded on the consent of the legislatures. (Italics ours.)

Mr. Williamson thought the resolution (the nineteenth) so expressed, as that it might be submitted either to the legislatures or to conventions recommended by the legislatures. He observed that some legislatures were evidently authorized to ratify the system. He thought, too, that conventions were to be preferred, as more likely to be composed of the ablest men in the states.

Mr. Gouverneur Morris considered the inference of Mr. Ellsworth from the plea of necessity, as applied to the establishment of a new system, on the consent of the people of a part of the states, in favor of a like establishment, on the consent of a part of the legislatures, as a *non-sequitur*. If the confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the Federal compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States, the supreme authority, the Federal compact may be altered by a majority of them, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposed that we are proceeding on the basis of the confederation. This convention is unknown to the confederation.

Mr. King thought with Mr. Ellsworth that the legislatures had competent authority, the acquiescence of the people of America in the confederation being equivalent to a formal ratification by

the people. He thought with Mr. Ellsworth, also that the plea of necessity was as valid in this case as the other. At the same time, he preferred a reference to the authority of the people expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new constitution, as well as the most likely means of drawing forth the best men in the states to decide on it. He remarked that among other objections made in the state of New York in granting powers to Congress, one had been that such powers as would operate within the states could not be reconciled to the constitution, and therefore were not grantable by the legislative authority. He considered it as of some consequence, also, to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions.

Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads in the state constitutions; and it would be novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the Federal compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people to be the true difference between a league or treaty, and a constitution. The former, in point of moral obligation, might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. First a law violating a treaty ratified by pre-existing law might be respected by the judges as a law though an unwise or perfidious one. A law violating a constitution established by the people them-

selves, would be considered by the judge as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitation, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this convention, in preference to congress, for proposing the reform, *were in favor of state conventions, in preference to the legislatures*, for examining and adopting it. (Italics ours.)

And against, upon August 31, we find that Mr. L. Martin insisted *on a reference to the state legislatures. He urged the danger of commotions from a resort to the people and to first principles* in which a government might be on one side, and the people on the other. He was apprehensive of no such consequences, however, in Maryland, whether the legislature or the people should be appealed to. Both of them would be generally against the constitution. Madison's Journal, p. 542. (Italics ours.)

Mr. Stillman, a delegate in the Massachusetts convention, in a general review of the constitution said:

> All the offices in Congress are elective, not hereditary. The President and senators are to be chosen by the interposition of the legislatures of the several states, who are the representatives and guardians of the people, who see honor and interest will aid them in all probability to have good men placed in the general government.
>
> Elliott's Debates, Vol. 2, p. 166.

In the New York Convention, Mr. Smith said:

> With respect to the second part of the amendment, I would observe, that, as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their control.
>
> Elliott's Debates, Vol. 2, p. 311.

In the same Convention, Mr Hamilton made this utterance:

> Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essay of treachery.

Elliott's Debates, Vol. 2, p. 266.

Mr. Dana in the Massachusetts Convention said:

> If they were recommended to be adopted by this Convention, it was very probable that two-thirds of the Congress would concur in proposing them; or that two-thirds of the legislatures of the several states would apply for the call of a convention to consider them, agreeably to the mode pointed out in the Constitution.

Elliott's Debates, Vol. 2, p. 138.

Mr. Iredell in the North Carolina Convention made clear his concept of what was meant by the term "legislatures":

> By referring this business to the legislatures, expense would be saved, and in general, it may be presumed they would speak the genuine sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that special purpose. This is, therefore, left discretionary. It is highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the states consented to them.

Elliott's Debates, Vol. 4, p. 177.

In the Virginia Convention, Patrick Henry was equally clear as to his understanding of what was meant by the word "Legislature":

> Two-thirds of the Congress, or of the state leg-

islatures, are necessary even to propose amendments. If one-third of these be unworthy men, they may prevent the application for amendments; but what is destructive and mischievous, is, that three-fourths of the state legislatures, or of the state conventions, must concur in the amendments when proposed. In such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.

Elliott's Debates, Vol. 3, p. 49.

Throughout the sittings of the Conventions, the resolutions offered and considered, and the debates upon them, whether in their first or final forms, the word "legislature" was used with like meaning whether applied to state assembly or the National Congress, distinguished only by the use of "state" or "national" before the word, as the object desired to be expressed required. Both state legislatures, with one or two exceptions and these not greatly variant, and the National Legislature, were, in the thought of these men, representative law-making bodies.

These papers and these debates, whether in the Constitutional Convention itself or in the state ratifying conventions, lead the mind irresistibly to that concept and interpretation of the term. If that was the understanding of the word by those who framed the Constitution and those who adopted it, and they so used it, then that it what it now means. We must continue to give it the meaning its framers and ratifiers intended it should have. What it meant to them, it must continue to mean to us.

Dred Scott Case, 19th R. 393.

3. Long and unvaried construction of the word "Legislatures" used in Article V, by the executive and legislative departments of the government, have conclusively established the meaning of the term.

Executive and legislative construction covering a century and a third of history, has conclusively established the meaning of the word "Legislatures" in Article V of the Constitution to be the general assemblies of the several states—their law-making bodies composed of representatives elected by the people—and exclude the "legislative power" interpretation.

Such construction, long continued and unvaried and acquiesced in, by other departments of the government, public officials and the people, if not absolutely binding upon this Court, is entitled to grave consideration and should be given great weight when the Court is called upon to examine and declare the meaning of the instrument or clause involved.

Willoughby on the Constitution, p. 20, sec. 20.

The term legislature, in either its singular or plural form, appears thirteen times and in ten different connections in the constitution with reference to state legislatures.

Article 1, Section 2, paragraph 1; Section 3, paragraph 1; Section 4, paragraph 1; Section 8, paragraph 17.

Article 2, section 1, paragraph 2.

Article 4, section 3, paragraph 1; section 4 (twice).

Article 5 (twice).

Article 6, paragraph 3.

Amendments 14, paragraph 2; 16, 17, paragraph 1, 2 (twice).

It cannot be claimed that the word is used in all these ten connections in the same sense; there are instances

in which it is perhaps used with the "legislative power" meaning contended for by the referendum advocates, as in section 4, Article 1, which reads:

> The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

We do not concede that it is so used in the clause just quoted, but granting it is, it does but accentuate the certainty that it is not so used in Article 5.

The grant of the power in section 4, of the first Article is a legislative grant giving to the law-making power of a state full authority to prescribe by a law, duly enacted, the times, places and manner of holding elections for senators and representatives.

The majority opinion in the Washington case, *State v. Howell, supra*, is founded in argument and in authority upon that contention and based upon *State ex rel. Schrader v. Polley*, 26 S. D. 5, and *State ex rel Davis v. Hildebrant*, 94 Ohio St. 154, and *State ex rel. Davis v. Hildebrant*, 241 U. S. 565.

Granting for the purpose of the present argument that the interpretation given the use of the word in Article 1 by the Dakota and Ohio courts and by this Court is correct, the cases are easily distinguishable from the case at bar and the meaning of the word "Legislatures," as used in the fifth Article.

The distinction is made with clearness and accuracy by Judges Parker and Mitchell in their dissenting opinion in the Howell case:

> The question in each of those cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of

representatives in congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of section 4, article 1, of the federal constitution, and the provisions of article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

In section 1, of Article 2, we have the following:

> Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors.

Can it be held with any degree of fairness of interpretation that a referendum could be held by a state upon the manner of appointing presidential electors?

Is it not clear that the framers of the constitution intended that the term "legislature" in this instance should mean a representative body of men who make the laws of the state?

Section 3 of article 1 of the constitution provides:

> The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Can it be contended that the framers of this section had in mind, when they provided for the election of United States senators by the "legislatures" of the several states, the "legislative power" of the states? Is it not clear that the intention was to designate a representative or delegated body?

The latter meaning and intention were so obvious that no one contended or even believed a United States senator could be elected by any other body than the state legislature, or that its power to elect could be impaired by the state or shared with the people through a plebiscite—so obvious, indeed, that the congress by more than a two-thirds vote proposed and submitted an amendment to the Constitution, to the legislatures of the several states for their ratification, divesting legislatures of their power to elect senators and vesting it in the people of the respective states.

This we submit is a high legislative interpretation of the meaning of the word as it appears in the third section of Article 1, where the connection in which it is used is identical with that in which it is used in Article 5.

Here is another congressional interpretation, which, we think, has value in this connection.

In 1887, the State of West Virginia had a constitutional

provision prohibiting the legislature from transacting, or entering upon, any business when in special session other than that set out in the proclamation of the Governor convening it.

There was a vacancy in the State's representation in the Senate of the United States.

The Governor waited to submit notice of the vacancy, until the legislature adjourned, and then appointed Mr. Daniel B. Lucas to fill the vacancy. Later he convened the legislature in special session, limiting in his proclamation the business of the session to eight distinct propositions enumerated therein. The election of a United States Senator was not mentioned in the proclamation. When the legislature convened in special session, it proceeded to elect Charles J. Faulkner to fill the vacancy in the Senate. A contest arose in the Senate of the United States as to which of the two men—Mr. Daniel B. Lucas, the Governor's appointee, or Mr. Charles J. Faulkner, the choice of the legislature—should be seated.

The Senate was then Republican and a majority of the committee on Privileges and Elections was composed of Republicans. On this committee were many distinguished Senators and some of them eminent lawyers—Hoar of Massachusetts, Fry of Maine, Teller of Colorado, Evarts of New York, Spooner of Wisconsin, Saulsbury of Delaware, Vance of North Carolina, Pugh of Alabama, and Ustes of Louisiana.

The committee reported, seating Mr. Faulkner and excluding Mr. Lucas. The action of the committee was affirmed by the Senate. In its report, the committee said:

> The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any state are void and of

no effect unless they can be so construed as not to conflict with its provisions. * * *

But it seems to the committee that the construction of the State Constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions should enter upon no business except that stated in the proclamation by which it was called together, the people must be presumed to have had in mind business to be transacted under authority of the State Constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States. * * *

But we are of the opinion that no state can prescribe any qualification to the office of United States senator in addition to those declared in the Constitution of the United States.

Here again, we have a clear case of legislative interpretation in accord with our contention of the meaning of the word "legislature" as used in the Fifth Article and opposed to the "legislative power" contention.

In Section Three of Art. IV, there is a provision that no state shall be "formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Can it be contended that a state, by any individual action of its own, could impair the power of the legislatures of two consolidating states and the Congress of the United States to consent to a consolidation by providing that the consent of the legislatures, or of either of them, to such consolidation should be invalid until submitted to a plebiscite?

And is not the connection and meaning of the word

"legislatures" as used in this Article, identical with the connection and meaning of the word as used in Art. V? The thing required of the legislature in each article, is consent and not legislation.

In Section Four of Art. IV of the Constitution, it is provided:

> The United States shall guarantee to every state in the Union, a republican form of government, and shall protect each of them against invasion and, on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

Can it be contended that a state, by adding a referendum clause to its constitution, could forbid the application of the legislature, or, if the legislature could not be convened, the application of the governer, to the United States for protection against domestic violence until a plebiscite could be held and such action authorized?

Was any thought like that in the minds of the men who framed this section? And, is not the word used in similar connection and with like meaning in Art. V as it is used in this section of the Fourth Article?

Does it not come with such cogency as to coerce conviction, considered in the light of history; precedent; interpretation, legislative and executive, and the context and connection in which the word "legislatures" is used in Art. V, that it was the intention of the fathers who formed, fashioned and adopted Art. V, to invest the complete power as to ratifying an amendment to the Constitution, in the legislature as a representative body and not in the intangible something called "legislative power"? and to so vest it to the exclusion of any direct participation by the people, except through the election of members of the legislature?

We know it is argued:

> That here, of all places, should the people be accurately heard when a change in their constitution is involved; that to interpret narrowly the word "Legislature" in Art. V will create a danger of unseemly conflicts between outside, direct expressions of popular will, and the official expression conveyed through the people's representatives; and that in interpreting a constitution, presumption should always favor whatever construction will best effect the end of all governments—the orderly welfare of their people.

But is that argument to outbalance the weight of the letter itself? the intention of the framers of the Constitution? and of the conventions that have adopted it? and the weight of one hundred and thirty-one years of unbroken precedent?

Is it not inconceivable that the power of determining the validity of ratification was meant to be vested in any one state, or anywhere but "in the Government of the United States"? The question goes, it seems to us, to the very heart of the National pact. Its life is dependent upon the answer, not immediately, perhaps, but eventually. It was well said by a citizen of my state, now dead, and formerly President of the United States, that the length of a step is not of so much concern as the direction of the step.

Interpretation of the Constitution is a judicial function. The Courts, however, may not make a new constitution. They may interpret the one that is. But even here, they may not be a "law unto themselves." There are rules of construction which bind them and which they must follow—even this high Court—rules made and established by you and your great predecessors for the court's guidance, and which we need but to suggest to have considered and followed.

The construction given must be a reasonable construc-

tion. Every clause must have a reasonable interpretation and held to express the intentions of the framers.

Woodson v. Murdock, 72 Wall. 351.

The Federal Constitution, like every other grant, is to have a reasonable construction according to the import of its terms.

Martin v. Hunter, 1st Wheat. 304, 326;
Pollock v. Farmers, 158 United States 601, 618, 619.

The Constitution and laws of the United States are construed as all other instruments granting power or property.

Rhode Island v. Mass., 12 Pet. 657, 723;
Brown v. Maryland, 12 Wheat. 419, 437;
U. S. v. Arredonds, 6 Pet. 691, 738, 740.

In the construction of the Constitution, the words, the subjects, the context, and the intentions of the persons using them are all to be taken into view.

U. S. v. Arredonds, 6 Pet. 691, 738, 740;
Rhode Island v. Mass., 12 Pet. 657, 721, 723;
Pollock v. Farmers, 158 United States, 691 618, 619.

These rules applied to the case at bar lead our minds with irresistible force to the conclusion that the term "legislatures" as used in Article V of the Constitution, vests the power to ratify an amendment to the Constitution in the general assemblies of the respective states and not in whatever "law making power" the vagaries of the various states may lead them to establish.

4. Ratification of an Amendment to the Constitution Is Not a Legislative Act. It Is Not a Law-making Function.

The Supreme Court of Ohio in the case at bar, and the Supreme Court of Washington in *State v. Howell*, *supra*,

each by a divided opinion, held the ratification of an amendment to be a law-making function. It seems clear to us, on reason, that it is not, and the great weight of authority holds that it is not. The act lacks the essential elements of law-making. As we have elsewhere pointed out in this brief, the power to ratify is not derived from the state at all, but from the Federal government through the national constitution. The legislature, therefore, takes the power into its absolute possession, unlimited, unaffected and indivisible by anything the state or its people may do. This fact alone strips it of every characteristic of state legislative action or power.

Ratification does not require the enactment of a law, the passage of a concurrent, or even a joint, resolution of the legislature; it could be done by a simple motion in each House and the action certified to the Secretary of State at Washington. It does not require the signature of the Governor; it does not even have to be submitted to him.

If it were a state legislative act, it would require submission to the Governor and his signature, either in approval, or in disapproval through a veto, in every state in the Union. If it required the exercise of the law-making power of a state, it would require the Governor's participation, for through his right to recommend legislation and to approve the same when enacted, and his power to veto it if he disapprove, the Governor is a very substantial element of the law-making power.

We are aware of the argument in the opinion of both the Ohio and the Washington courts that ratification is a high legislative function, but the argument is not con-

vincing. Ratification by a state enacts no law in and of itself; it but registers the state's assent through its legislature as the agency selected by the government of the United States for that purpose, to a proposal made by the Congress for an amendment to the Constitution. It is simply the state's "aye" uttered through its legislature when its name is called. It could quite as well be uttered by the Governor had he been designated by the Constitution as the ratifying agent, or by the Secretary of State, so far as legality is concerned.

Ratification is but one of the three steps in the making of an amendment now required by the Constitution. The first step is the submission of a proposal for an amendment by a two-thirds vote of Congress, then follow thirty-six partial steps, constituting all together a single step in the process—ratification or assent thereto by the legislatures of three-fourths of the several states—no one of which of itself constitutes a complete step. It can not become complete or effective without the concurrent action of the legislatures of thirty-five other states. It is the theory of the Constitution and of the very genius of our institutions, that the making of the National Constitution was the act, not of separate and disassociated sovereign peoples but of one people. The covenant is not "we, the states," but "we, the people"; not "we, the people of the State of Ohio," but "we, the people of the United States do ordain and establish this Constitution for the United States of America."

The legislatures of the several states are simply the agencies representing the people of the several states, selected by the Government of the United States through

which, and by whose act of ratification, the Government at Washington ascertains the fact that the people of the United States—all the people—not of one state, but of three-fourths of the states, ordain and establish a change in the Nation's organic law. These legislatures speak for their respective peoples not as distinct and separate peoples, but as certain designated parts of "we, the people of the United States."

The third and final step in the making of an amendment, is the ascertainment by the duly selected agency of the United States Government, of the fact that at least thirty-six ratifying agencies have ratified the amendment, and having ascertained the fact, the proclamation of it.

A state legislative power is capable of the full and complete exercise of every legislative function without let or hindrance from, or by, any outside power or agent. The legislative power of a state, whether it be vested in a legislature of the government of the state, or in the legislature of the government plus the people of the state, or the electors of the state, has within itself the ability to function with completeness and effect.

It can make a law, complete, full fledged, and effective —a living vital thing. This fact alone distinguishes that power from the ratifying function devolved upon the legislative agency selected by the Federal Constitution. The legislative power of a state comes from within, springs out of the inherent power of its people—the ratifying authority of the legislature of a state comes from without—a thing delegated by the Government of the United States, representative of all the people, through a National Constitution. Neither the state nor its people conferred the ratifying power and never having conferred

it, neither it nor its people can withdraw it. The power was conferred by another and greater sovereignty and can only be withdrawn or limited in its exercise by the power that conferred it.

The legislative power of a state may not only enact legislation, it may repeal it, or amend it, at will; but the legislature of a state cannot change by the crossing of a t or the dotting of an i a proposal for a constitutional amendment to the Federal Constitution submitted to it by the Congress of the United States for ratification. It must accept it or let it alone. It can only vote, either "aye" or "nay."

LEGISLATURE CANNOT RESCIND ITS RATIFICATION.

Having once ratified, it cannot recall its action, for in the act of ratification it exhausts its power. Having proclaimed its "aye" and recorded its vote, its function is ended. In Watson Const., Vol. 2, 1316, is the following statement, which we believe to be accepted law:

> It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practice, if a state legislature has once ratified a federal amendment a subsequent legislature has no power to rescind such ratification. Such rescision was attempted by Ohio and New Jersey with reference to the fourteenth amendment, and by New York with reference to the fifteenth, but the proclamation of the secretary of state for the United States was issued announcing the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescision by subsequent legislatures. The attempted rescision was ignored.

Commenting upon this fact, the Supreme Court of Maine, *in re* Opinion, *supra*, puts it well:

> If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject matter.

If the ratifying agency designated by the Constitution, at a time when it represents the complete law-making power of the state, save that shared by the Governor, cannot recall its act of ratification—and as we have just seen, it cannot—how can it be said that the people, upon whom the Constitution devolves no power to ratify, may recall the act of ratification. It seems to us there is but one answer: "There is no way under Heaven or among men, save by armed revolution—the power of might arrayed in battle."

LEGISLATIVE POWER LIMITED.

Again, we quote from the dissenting opinion of Judges Parker and Mitchell in the case of *State v. Howell*, *supra*. Speaking of the decisions in *Schrader v. Polley* and *Davis v. Hildebrant*, *supra*, relied upon by the majority of the Washington Court, they say, as we have already seen:

> The question in each of these cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in Congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provi-

> sion of its Constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of Section 4, Article 1, of the Federal Constitution, and the provisions of Article 5, of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the Federal Constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been held that the proposing of a constitution, or amendments to an existing one, is not the exercise of legislative power vested in the General Assembly of the state by a general grant, such as that contained in the following clause, found, either in exact form or substance in most American state constitutions:

> The legislative authority of the state shall be vested in the General Assembly.

Such power must be granted by a constitutional pro-

vision specifically authorizing the proposal of amendments.

Chicago v. Reeves, 220 Ill. 274; 77 N. E. 237-9-240;

Livermore v. Waite, 102 Calif. 113; 36 Pac. 426, 25 L. R. A. 312;

Warfield v. Vandiver, 101 Md. 78; 60 Atl. 538-540-542;

Commonwealth v. Griest, 196 Pa. 396; 46 Atl. 505; 50 L. R. A. O. S. 568;

Kochler v. Hill, 15 N. W. 609;

Morris v. Mason, 9 So. 776;

In re Senate File, No. 31, 41 N. W. 981, 25 Neb. 864;

Hatch v. Stoneman, 66 Calif. 632; 6 Pac. 734;

Oakland Paving Co. v. Hilton, 69 Calif. 479; 11 Pac. 3;

Edwards v. Lesueur, 132 Mo. 410; 33 S. W. 1130;

Holmberg v. Jones, 65 Pac. 563 (Idaho);

In re Denny, 156 Ind. 104;

Van Horn v. Dorrance, 2 Del. 304;

Cooley's Constitutional Limitations, (7th Ed.) 126;

Jameson Constitutional Conventions, (4th (Ed), 84, 359, 211, 388, 550, 600, *et seq:*

Evansville v. State, 118 Ind. 426;

Yancy v. Hyde, 121 Ind. 26;

Ellingham v. Dye, 178 Ind. 336 at 343-348-357-361-380.

In the case of the *City of Chicago v. Reeves*, just cited, the Illinois Supreme Court said:

The right to propose amendments to the consti-

> tution is not the exercise of legislative power by the General Assembly in its ordinary sense, but such power is vested in the Legislature only by the grant found in the constitution, and such power must be exercised within the terms of the grant.

In *Livermore v. Waite, supra*, it was held:

> The Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house or upon the Governor, or upon a special commission, or upon any other body or tribunal.

In *Commonwealth v. Griest, supra*, the Supreme Court of Pennsylvania said:

> It is not law-making power, which is a distinct and separate function, but it is a specific exercise of the power of the people to make its constitution.

Judge Jameson says on page 578, as to whether proposing amendments is fundamental or ordinary legislation:

> When the legislative action consists simply in affirming, by a resolution intended only as a step preparatory to further and other action either of that or of some other body, the expediency of amending the constitution, or in merely proposing such amendments as it deems desirable, such action cannot properly be called legislative.

The question decided in these cases is closely analagous to the question here under discussion. If the act of proposing an amendment to a state constitution is not a legislative act in the ordinary sense of the term, how can it be said that the act of ratification of an amendment to the Federal Constitution by a state legislature is a

legislative act? The principle involved is the same with the additional fact that the power of ratification in the case of a national amendment comes from the national government and not from the state, which adds substantial and controlling weight to the proposition that ratification is not a legislative act.

As herein before suggested, ratifying resolutions are not required to be submitted to the Governor of a state for his signature or even his consideration. In re Senate File 31, reported in 25 Neb., page 864, the Supreme Court of that state said:

> It will be conceded that under our constitution it is unnecessary to submit a proposition to amend the constitution, duly passed by each branch of the legislature, to the governor for his approval, as such proposition is not ordinary legislation.

The Supreme Court of California in *Hatch v. Stoneman*, 66 California 632, on page 634, held:

> The proposal of the amendment or amendments is not by the legislature, as such, in the ordinary enactment of a law, and with the proposal the Governor has nothing to do.

In *Warfield v. Vandiver*, 60 Atl., page 538, the Supreme Court of Maryland held that the proposal to amend the constitution was not legislation and hence the bill proposing constitutional amendments was not required to be submitted to the Governor for any action. The same is true of a ratifying resolution.

Certainly it cannot be said in the face of these authorities, or on reason, that the act of ratification of a Federal amendment by a state legislature is a legislative act done in the exercise of a state's law-making power. If this cannot be said, then the referendum clause in the

Ohio constitution by which ratification of Federal amendments by the legislature is suspended, cannot be sustained.

5. Congress alone under the Constitution has power to ascertain and proclaim the fact of ratification and to designate an agency to make such ascertainment and proclamation. In the exercise of that power it has determined the manner of ascertainment of the fact of ratification and of its proclamation, and its determination thereof is final and conclusive.

Congress alone may choose the mode of ratification within the limits of the discretion permitted it in Article V.; that is, it may select, as the ratifying agencies, either the legislatures of the several states or conventions. Within this limitation it has exclusive power.

The constitution does not designate a body to determine when such amendments have been ratified, or the validity of the acts of ratification. But Congress may choose the mode of ratification and in paragraph 18, Section 8 of Article I, of the Constitution, it is impowered:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.

The power here conferred authorizes the Congress to make a law "to carry into execution" the ratification provisions of Article V.

Acting under that authority, Congress has passed a law in the matter providing:

> That, whenever official notice shall have been received at the Department of State that any Amendment proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, it shall be the duty of the Secretary of State forthwith to cause the said Amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Stat. at Large 439; RS. Section 205; U. S. Comp. Stat., Section 303.

The above statute was enacted April 20, 1818. Prior to its enactment, the first ten amendments had been communicated to Congress by the President, and the eleventh had been declared adopted by the President in a message to Congress, while the twelfth was declared adopted by the Secretary of State by proclamation.

Wambaugh, Cases on Constitutional Law 26, Note 1;

Wambaugh, Cases on Constitutional Law 27, Notes 1 and 2.

After the Act of 1818, Secretary Seward referred to Congress ratifications made of doubtful validity by subsequent rejections, and Congress by resolution declared the amendment adopted.

Jameson Constitutional Convention, (4th Ed.) pages 582, 583;

Watson Const. 1314 and 1315.

The Congress, being clothed with the authority to choose the mode of ratification and to enact a law for the

execution of the act of ratification, according to the mode selected by it, and having by law selected the agency and the manner of ascertaining the fact of ratification and clothed the agency so selected with authority to proclaim the fact of ratification, naming in its certificate the states that have adopted the amendment, and proclaiming the fact of ratification and the validity of the act thereof, no other agency or power can declare the ratification by any state to be invalid.

The State of Ohio, therefore, had no power to provide in its constitution for a referendum on the act of ratification by its legislature or to suspend the taking effect of such act or to make it invalid, as it attempts to do, "until and unless" such act of ratification shall be confirmed by a vote of the majority of the electors of Ohio in a referendum plebiscite.

The action of Congress in enacting such a law and in designating the Secretary of State as the authority to ascertain the fact of ratification and to proclaim the adoption and the validity of the amendment, according as the information and the facts shall be found by him, is conclusive as against all other agencies.

Constitution making is a political question and inheres in the political departments of the Government of the United States—the legislative and executive departments—and where the legislative department has designated an agency to ascertain and proclaim the fact of ratification, the courts, to avoid conflict, refrain from any act looking to the overthrow of the decision and action of such department.

Legal Tender Cases, 110 United States 421;
Prize Cases, 2nd Black, (U. S.) 635;

Oetjen v. Central Leather Co., 246 United States 297;
Ricaud v. American Metal Co., 246 United States 304;
Jones v. United States, 137 U. S. 202;
Foster v. Neilson, 2 Pet. (U. S.) 253;
In re Cooper, 143 United States 472;
The James G. Swann, 50 Federal 108;
Miles v. Bradford, 22 Maryland 170;
Luther v. Borden, 7 How. (U. S.) 1, 39;
Pacific States, etc., Co. v. State of Oregon, 223 U. S. 118.

6. The referendum petition in the Ohio Constitution is invalid, being in contravention of the compact between the State of Virginia and the United States, and the people of the northwest territory, under which the State of Virginia ceded that territory to the United States with the covenant that the states formed from said territory should "be distinct republican states."

The referendum clause in the Ohio Constitution is contrary to the fundamental law not only of the State of Ohio, but to that of every one of the five states carved out of the northwest territory.

The last six clauses of the Ordinance of 1787 are not transient provisions, but permanent. They are not subject to repeal but are forever binding upon the State of Virginia, the Government of the United States, the people inhabiting the northwest territory, and of the states carved therefrom. They constitute a solemn compact and covenant indissolvable save by the mutual consent of Virginia, the Government of the United States and the

states of Ohio, Indiana, Illinois, Michigan and Wisconsin.

This court is, of course, familiar with every step and detail of that great compact and of every step connected with its enactment, and the reasons therefor, and yet, we venture a brief review of them that the court may have them before it for consideration in connection with the matters here-in-after presented.

The evidential facts are historic and within the judicial cognizance of the courts.

TITLE IN GREAT BRITAIN.

a. At the date of the Declaration of Independence, the land north of the River Ohio belonged to Great Britain.

CONQUEST OF CLARK.

(1777.)

b. In 1777, Governor Patrick Henry, of the State of Virginia, commissioned George Rogers Clark to raise a force of *Virginia Militia* and take "by international law of conquest," from Great Britain all the land which was afterwards designated the "Northwest Territory." A military force, under the command of General Clark, financed by the State of Virginia, during the administrations of Governors Patrick Henry and Thomas Jefferson, succeeded in its mission after several years of warfare, and the flag of England was lowered and that of the State of Virginia raised over the Territory. Virginia established a court at Vincennes and the laws of Virginia became the laws of this Territory.

RESOLUTION OF VIRGINIA.

(January 2, 1781.)

c. "Resolution (of the General Assembly of Virginia) for a cession of the lands on the west side of Ohio to the U. S." "The General Assembly of Virginia * * * * preferring the good of their country to every object of smaller importance,

DO RESOLVE, That this Commonwealth will yield to the Congress of the United States, all right, title and claim that the said Commonwealth hath to the lands northwest of the river Ohio, upon the following conditions, to-wit:

That the states so formed shall be *distinct republican states*, and shall be admitted members of the federal union, having the same rights of sovereignty, freedom and independence as the other states."

Henings Statutes Va., Vol. 10, page 564.

VIRGINIA ACT OF SESSION.

(June 6, 1783.)

d. Authorizing the delegates of Virginia to the Congress of the United States to convey by deed to the United States.

"Upon condition * * * that the states so formed shall be *distinct republican states*."

Henings Stats., Va., Vol. 11, page 326.

ACCEPTANCE OF CONFEDERATED CONGRESS.

(September 13, 1783.)

e. "Upon condition * * * that the States so formed shall be distinct republican states."

Journal 8, 254, 260.

Virginia's Deed of Cession.

(March 1, 1784.)

f. "Convey, transfer, assign and make over unto the United States in Congress assembled, for the benefit of all the said states * * * subject to the terms and conditions contained in the before cited Act of Congress of September 13th, last, that is to say, upon condition * * *; that the states as formed shall be distinct *republican states*."

Hennings, Vol. II, page 571.

Confederation Congress Revision of Virginia Act of Cession.

(July 7, 1786.)

Ordinance of 1787—Confederation Congress.

(July 13, 1787.)

h. "Be it ordained by the U. S. in Congress assembled" * * * "It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as Articles of COMPACT, between the original States and the people and states in the said territory, and *forever remain unalterable, unless by Common Consent*, to-wit:

* * * * *

Article 5. There shall be formed in the said territory not less than three nor more than five states, etc. * * * PROVIDED, The Constitution and government so to be formed *shall be republican*, and in conformity to the principles contained in these articles."

1. V. 1. U. S. 475.

MODIFIED CESSION OF VIRGINIA.

(December 30, 1788.)

i. Section 1. "Whereas, the United States in Congress assembled did on July 7, 1786, recommend a revision of the Act of Cession, so far as to empower Congress to make such a division of the said territory into *distinct republican states* * * * and the said United States hath in an ordinance * * * passed July 13, 1787, declared the following as one of the articles of Compact between the original states and the people and states in said territory (here 5th Article of Ordinance of July 13, 1787, is recited) * * * This Commonwealth to assent to the proposed ratification * * *.

BE it enacted * * * That the aforesaid recited Article of Compact between the original States and the people and States in the territory northwest of the Ohio river be and the same is hereby ratified and confirmed * * * etc.

12 Hennings St. Va. 780.

ACT OF CONGRESS TO PROVIDE FOR THE GOVERNMENT OF THE TERRITORY NORTHWEST OF THE RIVER OHIO.

(August 7, 1789.)

j. "Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may continue to have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States." Then follows several short provisions regarding the Officers to be appointed by the President and Senate for the Government of the Territory.

U. S. Stat. at Large, Chap. 8, page 50.

ENABLING ACT OF CONGRESS.

(April 30, 1802.)

k. "An act to enable the people of the eastern division to form a constitution and state government, etc.

Section 5. "And be it further enacted, That the members of the convention, etc. * * * *Provided the same shall be republican* and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the peoples and states of the territory northwest of the River Ohio."

U. S. Stat. at Large, Vol 2, page 173.

ORDINANCE AND RESOLUTIONS PASSED IN CONVENTION BY OHIO DELEGATES.

(November 29, 1802.)

l. "Propositions accepted by representatives of the people of the Eastern Division in Convention."

CONSTITUTION OF OHIO.

(November 29, 1802.)

m. Preamble. "We, the people of the eastern division of the territory of the United States, northwest of the River Ohio, having the right of admission into the general government, as a member of the Union, consistent with the Constitution of the United States, THE ORDINANCE OF CONGRESS OF 1787, AND OF THE LAW OF CONGRESS, ENTITLED 'AN ACT TO ENABLE THE PEOPLE OF THE EASTERN DIVISION OF THE TERRITORY OF THE UNITED STATES, NORTHWEST OF THE RIVER OHIO, TO FORM A CONSTITUTION AND STATE GOVERNMENT * * *.'"

ACT OF CONGRESS RECOGNIZING STATE OF OHIO.

(Feb. 19, 1803.)

a. "Whereas the people of the eastern division of the territory northwest of the River Ohio, did, on the 29th day of November, 1802, form for themselves a constitution and state government," etc.

U. S. Stats. at Large, Vol. 2, page 201.
Thorpe's Am. Const. Vol. 5, page 2900.

Here is a cession by the State of Virginia of a vast tract of land to the general government made on a compact and COVENANT RUNNING WITH THE LAND as it were —a covenant that "the Constitution and Government (of the states to be formed on the lands so deeded) shall be republican, and in conformity to the principles contained in these articles."

Here is also acceptance by the Congress through a provision in the ordinance it adopted, that such states should be "republican in their form of government" and be "distinct republican states" and that such provision should be a "compact between the original states and people and states in said territory, and forever remain unalterable unless by common consent."

There is, also, in this connection, the formation and adoption of the Constitution for the United States guaranteeing by one of its express provisions "a republican form of government" to every state.

Here is also the act of Congress enabling the people of the eastern division of the northwest territory, to form a constitution and state government, "provided the same shall be republican and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the River Ohio."

Here, too, is the acceptance by the people of Ohio in convention assembled, of the enabling act passed by Congress.

And here is the Constitution drafted by the Convention

and subsequently adopted by the people of the State of Ohio, coming into the union on terms "consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the law of Congress entitled, 'An act to enable the people of the eastern division of the territory of the United States northwest of the Ohio River, to form a constitution and state government.'"

The whole amounts to a deed and transfer of land and sovereignty, made on condition that the states, which should be born of it, should be "distinct republican states," and the acceptance of the deed and its terms by the National Government and by the people of the State of Ohio.

If these several instruments and acts do not constitute an irrevocable covenant, then states and nations are without language, terms, or power to make such a covenant.

But it *is* a covenant, solemn, binding and perpetual, and has been recognized as such by the State of Virginia, by every department of the National Government, by the people inhabiting the five states formed out of the land conveyed, and by the states themselves.

The Indiana Constitutional Convention held under the enabling act authorizing its organization as a state, furnishes a convincing example of the sort of acceptance of the covenant in the Ordinance of 1787 and of the enabling act passed by Congress:

> Be It ordained * * *:
>
> That we do for ourselves and our posterity, agree, determine, declare and ordain, that we will, and do hereby, accept the propositions of the Congress of the United States as made and contained in their act of the 19th day of April, 1816, entitled * * *.
>
> And we do, moreover, for ourselves and our posterity, hereby declare and ordain that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate, without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof.
>
> (Signed) JONATHAN JENNINGS,
> President of the Convention.
>
> Attest: WILLIAM HENDRICKS, Secretary.

We are clearly within the facts when we state that each of the five states, though in language somewhat varied, solemnly entered a like acceptance of such ordinance and the Congressional enabling acts relating thereto.

It is important to note here, and in this connection, and to bear the fact in mind, that the enabling act of Congress for the admission of Ohio and for each of the other four northwest territory states, was passed after the formation of the American Union and the adoption of the Federal Constitution, and the organization of the Federal Government, and is a recognition by the Government of the United States and of the political branch of it, that the last six articles in the Ordinance of 1787 was then a valid and binding covenant, the terms of which as to each of the new states, being "distinct republican states," it scrupulously conformed to, by providing that "the same shall be republican and not repugnant to the Ordinance of 13th of July, 1787."

The compact contained in this ordinance so solemnly entered into and so clearly and unequivocally accepted, is still held in force by the courts of the five states coined out of this Land Northwest of the River Ohio, and by the Federal Courts as well. The decisions of these courts, relating to the question under consideration, are of course familiar to the members of this high Tribunal, but we venture to review them here and in this connection.

Federal Cases in Ohio and Indiana.

Spooner v. McConnell, 1 McLean 337, (1838);
Palmer v. Com., 3 McLean 226, (1843);
Vaughan v. Williams, 3 McLean 530, (1845);
Jolly v. Terre Haute, 6 McLean 235, (1853).

1. *Spooner v. McConnell*, 1 McLean, 337, s. c. No. 13245, Volume 22, Federal Cases. This case was heard by Mr. Justice McLean and Judge Leavitt in the United States Circuit Court for Ohio in 1838.

Mr. Justice McLean said:

> It is a well-established principle that no political change in a government annuls a compact made with another sovereign power, or individuals. The compact is protected by the sacred right of plighted faith, which should be cherished alike by individuals and organized communities * * *.
>
> This compact was formed between political communities and the future inhabitants of a rising territory and the States which should be formed within it.

This is a fundamental rule of international law. "Nations ought inviolably to observe their promises and their treaties." Vattel, Ch. 12.

Judge Leavitt reviewed at length the history of the times leading up to the ordinance, and then said:

> When it is declared to be the intention of the articles of the compact to extend the fundamental principles of civil and religious liberty, and to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in said territory, there can be no hesitancy in saying it was designed to lay a strong and enduring foundation on which the structures of governments should be based.

Both agreed when a provision of the subsequent Federal Constitution was different from the ordinance, such provision of the ordinance was superseded, otherwise, not. In illustration, Mr. Justice McLean said the 6th article prohibiting slavery remained. The provisions of Article 2, touching the inviolability of private contracts, was carried forward into the Constitution. But there is nothing

found in the Federal Constitution in conflict with the rule of "proportionate representation" as established in the Ordinance.

In *Vaughan v. Williams*, 3 McLean 530, s. c. No. 16903, Vol. 28, Federal Cases, an Indiana case, Mr. Justice McLean said:

> When the people of Indiana came into the Union as a State, they were as much bound by the Constitution of the United States as the people of any other State. And any part of the ordinance which conflicts with the Constitution of the Union, so far as the State of Indiana is concerned, was consequently annulled.

Which is to say the articles not in conflict remain. And this was his well-known view.

Spooner v. McConnell, supra, was affirmed by Mr. Justice McLean in *Palmer v. Cuyhoga Co.*, 3 McLean 226, s. c. 16088, 18 Fed. Cas. 1026, and by Judge Leavitt in *Jolly v. Terre Haute Bridge Co.*, 6 McLean 237, s. c. No. 7441, 13 Fed Cas., p. 919; citing *Hogg v. Zanesville, etc., Co*, 5 Ohio 416.

INDIANA.

This court, from the beginning, has recognized the ordinance as a fundamental charter of our State government.

1. In *Henthorn v. Doe*, 1 Blackf. 157 (1822), the court recognized the Virginia cession of December 20, 1783 (R. S. 1843, page 16), and the deed thereunder, as being in force and obligatory in our courts, saying:

> Prior to the year 1783 the State of Virginia had the sovereignty of all this territory now included in the States of Ohio, Indiana and Illinois. By her act of cession to the United States in 1783, and her deed in conformity thereto, she transferred all her territory northwest of the Ohio River, saving and excepting certain reserves.

And the court held Virginia, under the clause in the Act of Cession providing for General Clark and his regiment, "according to the laws of Virginia" had legislative power as to Clark's grant, and rightfully passed laws "on the subject of these lands."

That is to say, the Act of Cession of 1783 was not annulled *in toto* by the Federal Constitution.

2. In *Cox v. State*, 3 Blackf. 194 (1833), it appeared that Cox had built a milldam across White River. He justified, under an act of the State dated January 13, 1826. The act was held invalid, because:

(1) By the latter clause of the 4th article of the Ordinance of 1787, White River became and remained a common highway and forever free.

(2) And that ordinance was in force in this State because:

> The act of Congress of the 19th of April, 1816, is the act enabling the people of Indiana Territory to form a constitution and State government; and the proviso to the 4th section declares—that the articles of the ordinance of the 13th of July, 1787, are irrevocable; and that the constitution and State government of the territory, when formed, should not be repugnant to those articles; and the Ordinance of Indiana of the 29th of June, 1816, accepts the propositions and conditions of that act of Congress.

And farther on the court says:

> The ordinance of Congress of the 13th of July, 1787, which is made perpetual and irrevocable between this State and the United States by the act of Congress of the 19th of April, 1816, and the Ordinance of Indiana of the 29th of June, 1816, puts it out of the constitutional power of either the State or the United States to authorize such an obstruction.

The same reasoning must apply to the provision for proportionate representation.

This case was approved in *Williams v. Beardsley*, 2 Ind. page 596 (1851). We also cite:

Vaughan v. Williams, 3 McLean 530 (1845);
Jolly v. Terre Haute, 6 McLean 235 (1853);
Depew v. Wabash, 5 Ind. 8.

MICHIGAN.

In *Giddings v. Blackner*, 52 N. W., foot page 946, in discussing an apportionment act, it was said:

> It (equality of representation) lies as the basis of our free government. It is guaranteed not only by the constitution, but by the Ordinance of 1787, organizing the territory out of which the State of Michigan was carved.

ILLINOIS.

In 1825 the Supreme Court of Illinois held in *Phœbe v. Jay*, 1 Breese 268, that the Ordinance of 1787 was binding on the people of that State, except as abrogated by common consent. Later in *People v. Thompson*, 40 N. E. 312-313, it appears the counsel on neither side contended that the ordinance was in force. And the court, in a dictum, seemed to think that it was not.

WISCONSIN.

In the case of *Connecticut Ins. Co. v. Cross*, 18 Wis. 109, the court was of the opinion that the ordinance was in force in that State, except as to such parts as were in conflict with the provisions of the Federal Constitution.

See

Milwaukee, etc., v. Schoener, etc., 23 Wis. 144;
Wisconsin, etc., v. Lyons, 30 Wis. 61;
Attorney-General v. Eau Claire, 37 Wis. 400.

The question came fairly before the Supreme Court of Wisconsin in the case of *State v. Cunningham*, 51 N. W. 724 (1892). This was an original suit in the Supreme Court to enjoin the Secretary of State from carrying into execution the statute of 1891 on the subject of apportionment for legislative purposes. The court held (1) it had jurisdiction over the question; (2) that the Secretary of State was not immune from judicial process to restrain action under the constitutional act; and (3) that the act was void, because:

> This apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this State, guaranteed to them by the Ordinance of 1787 * * * (foot page 729).

It is for the courts of these five States, severally, to decide for their respective States whether the ordinance requires the States to give their peoples "proportionate representation in the Legislature." We insist that the article of the Ordinance of 1787 on this subject, is the law of Indiana, first, by virtue of its own force, and second, by the Enabling Act of April, 1816, and the ordinance of this State.

OHIO.

The Supreme Court of Ohio, with a single exception, has always held the ordinance to be in force.

Hogg v. Mfg. Co., 5 Ohio 410, 416;
Hutchinson v. Thompson, 9 Ohio 52, 62;
Cochran's Heirs v. Loring, 17 Ohio 409, 424-5;
Betts v. Wise, 11 Ohio 219 (1842);
Lyon v. Lyon, 1 O. C. C. (N. S.) 246;
STATE V. BOONE, 84 O. S. 346, (1911), 95 N. E. 924.

In the last case the court holds the clause in Article 2 of the ordinance that "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same," is now in force.

And the court stands firm that the Constitution of the United States does not mean "that all State constitutions shall be, or are, alike; nor that a new State erected in the Northwest Territory shall be understood to surrender all the guaranties of the compact as a condition of admission as a State."

The courts of none of the five Northwest-territory states have more faithfully, soundly or eloquently upheld the inviolability of this compact than did the courts of the State of Ohio for almost a century.

The opinion of the Supreme Court of Ohio in *State v. Boone, supra,* is so cogent and unanswerable in its reasoning, that we quote from it, beginning on page 354:

> * * * This language should be read in the light of the facts of that case; but, assuming that it correctly states the law in its general application, there is grave reason to doubt whether it is sound law in this jurisdiction, owing to specific provisions of the Ordinance of 1787.
>
> The purview of that famous act of Congress is expressly "for the government of the territory of the United States northwest of the River Ohio." The first twelve sections of the ordinance obviously provided for the temporary government of the territory until it should be divided and organized into states. Then follows something of more enduring interest. We quote:
>
> "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and

governments, which forever hereafter shall be formed in said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest. It is hereby ordained and declared, by the authority aforesaid, that the *following articles shall be considered as articles of compact*, between the original states and the people and states in said territory, *and forever remain unalterable, unless by common consent*, to-wit:" Then follows the several articles of compact * * *.

Perhaps it may be said that the adoption of a constitution by the people of Ohio superseded the Ordinance of 1787, and that the constitution of Ohio contains no such provision as that which we have quoted from Article II of the Ordinance of 1787. We recur again to the "articles of compact" and quote from Article V: "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; PROVIDED, *The Constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles.*" If our constitution, instead of creating a republican form of government for the state, had provided a pure democracy, a government directly by the people, and, so framed, it had been accepted by the president and congress of the United States, there might have been some reason for the claim that, in that respect, the compact which was to "remain forever unaltered, unless by common consent" had been repealed by implication; yet under such circumstances, conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto. But if the convention which prepared our constitution had omitted the

Bill of Rights, the famous interdiction against slavery, contained in Article VI of the ordinance, would that have justified the conclusion that the compact was altered and that the existence of slavery in Ohio would be constitutional? Or, to put the question in another form, if our constitution contained nothing whatever in regard to the privilege of the writ of habeas corpus, or to trial by jury, or to proportional representation of the people in the legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great compact had been altered and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included among the rights reserved by the people (Const. of Ohio, Art. I, Sec. 20); because there would have been nothing in the constitution which was inconsistent with the ordinance and the declared purpose thereof "to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory," and these "articles shall be considered as articles of compact between the *original states* and the *people* and *states* in the said territory, and forever remain unalterable, unless by common consent."

In *Hogg v. Mfg. Co.*, 5 O. Rep. 410, at page 416, Hitchcock, J., speaking of a clause in Art. IV of the ordinance, said, "This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by contract, this clause must be considered obligatory." And in *Hutchinson v. Thompson*, 9 O. R. 52, at page 62, Grunke, Judge, remarked: "But when application for admission into the Union was made by the people inhabiting

the eastern part of the territory, modifications in several parts of the Ordinance were asked for, and they were granted by the United States, as one party, to the state, as the other. This seems to show that the people of Ohio have, so far, treated the Articles of Compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state constitution, and were of no importance if the state should have a right to annul the ordinance the moment it assumed that condition."

Similar language is found in the opinion in *Cochran's Heirs v. Loring*, 17 O. R. 409, 424, 425, and the foregoing quotations remain as the unmodified expression of this Court, upon this subject.

We are not unaware of various dicta which have appeared from time to time in opinions by learned justices of the Supreme Court of the United States, beginning with *Pollard's Lessee v. Hagan*, 3 Howard, 212 and *Permoli v. First Municipality*, 3 Howard, 589, 616; *Strader v. Graham*, 10 Howard 82. But it requires no acute analysis to differentiate those cases, and to show that they do not go very thoroughly into the question whether the Ordinance of 1787 can be superseded otherwise than by the "common consent" of the parties to the Compact, as required by the terms of the Ordinance, or whether such common consent ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress, which may be repealed or superseded by subsequent acts, and a solemn and formal compact in the nature of a treaty, as it were, between the proprietary states and the people as states of the territory, which was subsequently to be erected into several states of the Union.

The compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of "all laws, constitutions and governments which forever

hereafter shall be formed in the said territory," and at best, these declarations rest on no stronger foundation than the provision of the compact itself, namely, that a state with constitutional limitations, as provided, "shall be admitted, *by its delegates*, into the Congress of the United States, on an equal footing with the original states, in all respects whatever." See cases above cited and *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 689; *Van Brocklin vs. Tenn.*, 117 U. S. 151, 159; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 296; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9-10. Whatever that clause may mean, it certainly does not mean that all state constitutions shall be, or are, alike, nor that a new State erected in the Northwest Territory shall be understood to surrender all the guaranties of the compact as a condition of admission as a state.

We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest Territory is still under, and above, and before, all laws or constitutions which have yet been made in the States which are parts of the territory.

In *Hogg v. Zanesville*, *supra*, appears the following:

This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more; for the constitution may be altered by the people of the state, while this can not be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory.

In *Hutchinson v. Thompson*, *supra*, the court said:

The ordinance consists of two parts; first, of a constitution of government for the then territory; and secondly, of articles of compact, which were intended to look beyond the period when the people should emerge from their territorial condition, and

become members of the union. I have called this part a compact, because it is so termed in the instrument; but if it were not for some things which have since taken place, there might be great difficulty in regarding it in that light. There was, in reality, but one party to it, originally, and that was the general government. But when application for admission into the union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted, by the United States as one party, to the state, as the other. This seems to show, that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state constitution, and were of no importance, if the state should have a right to annul the ordinance the moment it assumed that condition. The state may thus, by its own act, have converted that into a compact which was before only a fundamental act of Congress.

In *Cochran's Heirs v. Loring supra*, there is this like affirmance of the compact's sanctity:

> This article follows a declaration in the ordinance to this effect: "It is hereby ordained and declared, by authority aforesaid, that the following articles shall be considered as articles of compact between the original state in the said territory, and forever remain *unalterable*, unless by common consent." The principles declared in these articles, and they are similar in character to principles declared in a bill of rights, are to prevail not only during the territorial government, but for all coming time. They must "*forever remain unaltered.*"
>
> *Lake Shore &c. R'y Co. v. Cleveland &c. R'y Co.*

We are not unaware that the Supreme Court of Ohio, in the case of *Dunlap v. Edmundson*, 29 O. St. 92, by a

divided opinion, erroneous, and we believe invalid, held that the Ordinance of 1787 was entirely superceded by the Constitution of Ohio.

The portion of the opinion and syllabus on the question of the validity of the Ordinance of 1787 is SIMPLY JUDICIAL OBITER. The question was not within the issues of the case submitted as may be seen by referring to a copy of the petition in the case of *Donahey v. Edmondson*, which petition we print as an appendix. There was in the issues nothing upon which to found that portion of the opinion.

In the words of the dissenting opinion of Judge Wanamaker:

> 1. The Ordinance of 1787 has absolutely no relevancy in this case, and is even more inapplicable and foreign to it than was this same ordinance in the case of *State of Ohio v. Boone*, 84 Ohio St. 346.
>
> The question in each one of these cases was: Is a certain act, passed by the general assembly of this state, contrary to the constitution of this state?
>
> The question is not: Is the act in question contrary to the Ordinance of 1787, or is it contrary to the Ten Commandments or the Lord's Prayer? One inquiry is about as relevant as the other.
>
> 2. This court can no more abolish or eliminate the Ordinance of 1787 than it can abolish or eliminate the American Declaration of Independence or the English Magna Charta. The Turkish pasha, with equal propriety, might issue a decree repealing our federal constitution and the Russian czar a similar edict nullifying our American democracy.

We strongly maintain that this portion of the syllabus and of the opinion holding the ordinance to have been superseded by the Constitution of Ohio, is but *obiter dicta*, it is without force or effect—a judgment outside the issues. *Carroll v. Lessee of Carroll*, 16 How. 275-286.

The rule laid down in the Carroll case is so well established and so universally accepted by the courts of the country, that we content ourselves by quoting from the decision in that case, without citing additional authorities:

> If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.
>
> And, therefore, this Court and other courts organized under the common law, has *never held itself bound by any part of an opinion in any case* which was not needful to the ascertainment of the right or title in question between the parties. In *Cohen v. State of Virginia*, 6 Wheat. 399, this Court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Chief Justice Marshall said:
>
> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

There are some cases which, when casually read, seem to sustain the doctrine that the compact in the Ordinance is no longer valid or binding either in Ohio or elsewhere.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565;

Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739;

Escanaba, etc., Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446;

Lewis Sands v. Manistee, etc., Co., 123 U. S. 288;

City of Cincinnati v. Louisville, etc., Co., 123 U. S. 389.

A study of these cases, however, shows that in none of them was involved the question as to whether the provision in the Ordinance of 1787, to the effect that each of the states carved out of the Northwest Territory should have a "republican form of government" and be a "distinct republican state."

A brief statement of the issues presented to the Supreme Court of the United States in each of the cases, is sufficient to show that the question involved in the case at bar was not presented; and so could not be decided.

1. *Pollard's Lessee v. Hagan*, was an action in ejectment in the courts of Alabama and taken on writ of error into the United States Supreme Court. The land in controversy was under the navigable water of Mobile Bay when the United States acquired title on April 24, 1802, by a deed of cession from Georgia quite like that from Virginia, only that the sixth article (forbidding slavery) was omitted. Afterwards, Alabama was made a State and admitted into the Union. Thereafter the United States by patent conveyed the land in dispute, under which patent the plaintiffs claimed title. Afterwards, the shore was filled out and became a lot in the city of Mobile. And the question was whether the United States took a vendable

right in the land covered by navigable waters under the deed from Georgia.

It was held not, because "to give the United States the right to transfer to a citizen title to the shores and soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise the numerous and important classes of police powers." (Page 230.)

Of course this does not resemble the case at bar.

2. *Permolli v. Municipality* (New Orleans), 3 How. 589. The City of New Orleans for sanitary purposes had an ordinance making it a penal offense for any person to officiate at a funeral at any church except in the obituary chapel." Permoli, a priest, was charged with the violation of this ordinance. He admitted he had officiated in a church where the coffin was opened in public. He plead the ordinance was void because, after the Louisiana purchase in 1803, by the act of Congress of 1805, it was enacted that the inhabitants of the Orleans territory should enjoy all the rights given to the inhabitants north of the river Ohio under the Ordinance of 1787, except one clause prohibiting slavery.

Permoli bottomed his contention on the provision in Article I of the Ordinance of 1787, that "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory."

Religious freedom does not mean liberty to expose an infectious body in public.

3. *Strader et al. v. Graham*, 10 How. 82, was a writ of error from the Supreme Court of Kentucky. The facts were that the defendants ran a line of steamboats on the

Ohio River. Graham brought an action in the chancery court at Louisville, charging that the defendants received three of his slaves on board the steamboat, Pike, at Louisville, and transported them to Cincinnati, Ohio, from whence they escaped to Canada, to his damage in the loss of their value. The defendants pleaded that the negroes were free men when received on board because prior thereto, Graham had permitted them, being musicians, to be for a time in Ohio, whereby they were made free. The plaintiff contended that inasmuch as his slaves had again returned to Kentucky and were held by him as slaves at the time of the transportation, they were his slaves. He recovered a judgment on this contention, which was affirmed by the Supreme Court of Kentucky. Both courts held that the colored men were in fact slaves. Only questions of law are presented on a writ of error from the Supreme Court of a State into the Supreme Court of the United States. And so the latter court held the judgment of the Kentucky courts "upon this point is, upon this writ of error, conclusive upon this court and we have no jurisdiction over the case." The judges engaged in a moot political discussion over the ordinance—but of course the court could not adjudicate upon the ordinance as they had no jurisdiction to try the case.

4. *Escanaba Company v. Chicago*, 107 U. S. 689. The Escanaba Company was a corporation created under the laws of Michigan and owned a line of vessels on the lakes, employed in carrying ore from Escanaba to the docks of the Union Iron and Steel Company on the river in Chicago. The lake and the river form a continuous highway for commerce among the States. The Daniel Ball, 10 Wall. 557. The city maintained across the river several

drawbridges. For the accomodation of the people of Chicago, an ordinance fixed certain hours of the morning and evening when the draws should be closed; and at other times the draws should not be opened for the passage of a vessel longer than ten minutes at a time.

The company brought its suit in the Circuit Court of the United States at Chicago, against the city, to enjoin it from closing the draws for the morning and evening hours, and enforcing the ten minutes' limitation, and to compel the removal of the bridges. The bill was based on that clause of Article 4 of the Ordinance of 1787, reading:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Applying the case to the above provision, the court declared:

> The navigation of the Illinois River (Chicago River) is free so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges.

Having held that the bridges were not an illegal obstruction to navigation, it is plain to see that the question whether that clause of the ordinance was annulled by the Federal Constitution was not open to adjudication. Nevertheless, Mr. Justice Field, in the course of the opinion, said:

> Whatever the limitation upon her (Illinois') powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any op-

> erative force, except as voluntarily adopted by her, after she became a State of the Union. (P. 688).

So it is patent that the court could not and did not adjudicate that the Ordinance of 1787 was defunct in toto.

5. The Ordinance of 1787, was under discussion in the Insular Cases, reported in 182 U. S., pp. 1-391. The question in these cases was the status of the Philippines and Porto Rico. And one question was whether these islands occupied the same political status as the Northwest Territory under the Virginia cession and the Ordinance of 1787. And this brought forward a discussion, both at bar and from the bench, as to the scope and duration of that ordinance.

See pages 47, 171, 249, 279, 319, *et seq*

The fullest discussion was made by Chief Justice White. He said:

> The opinion has been expressed that the Ordinance of 1787, became inoperative and annulled on the adoption of the constitution. (Taney, C. J., in *Scott v. Sanford*, 19 How. 393, 438.) On the other hand, it has been said that the Ordinance of 1787 "was the most solemn of all engagements" and became a part of the Constitution of the United States by reason of the sixth article (U. S. Const.) which provided that "All debts contracted and engagements entered into before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation." Per Baldwin, J., concurring opinion in *Lessee of Pollard's Heirs v. Kibbe*, 14 Pet. 353, 417, and per Catron in dissenting opinion in *Strader v. Graham*, 10 How. 82, 98. Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under the constitution, the provision of the Northwest Territory ordinance making such territory forever a part of the confederation was not binding on the government of the United States when the constitution was framed.

6. In the Manistee River case, *supra*, while the Court, in passing, seemed to affirm the doctrine that the Ordinance was no longer binding in Michigan, the case was really decided "independently of these considerations," because "there is nothing in the language of the fourth Article of the Ordinance respecting the navigable waters of the Territory emptying into the St. Lawrence, which, if binding upon the state, would prevent it from authorizing the improvements made in the navigation of the Manistee River."

7. In the Cincinnati case, the Court laid down the rule to be:

> The Ordinance of 1787, as an instrument, limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that Territory, ceases to be, in itself, obligatory upon such states from and after their admission into the Union as states, *except in so far as adopted by such states and made a part of the law thereof.* This has been the view of this Court, so often announced, as to need no further argument. (Italics ours.)

Further, in the opinion in the Escanaba case, *supra*, is quoted as holding that the Ordinance ceased to be an operative force in Illinois except as voluntarily adopted by her after she became a state of the Union.

In both these cases, it seems to us, the Court overlooked the fact that the Northwest-Territory states—especially Ind. and Ohio and Ill.—formally entered the Union with a solemn acceptance of the pact provisions of the Ordinance. Acceptance was made a condition of their entry and at the time of their entrance and the establishment of their constitutions, they accepted its covenants. We print as appendixes the Enabling Acts of Congress for the formation of the States of Ohio, Indiana and Illinois.

This has been, we think, the uniform holding in Indiana and certainly so in Ohio, with the single *obiter dictum* pronounced in *Donehay v. Edmondson, supra.*

The doctrine of sanctity and binding, controlling character of the pact contained in the great Ordinance stands; founded on reason, backed by precedent, in both Indiana and Ohio.

This being true, it is the duty of the Court to accept the fact and give it confirmation.

A Republican Form of Government.

With the guarantee of the republican form of government accepted, we come now to the question of what such form of government is—what is a distinct republican state?" and we do not have to hunt long or travel far for the definition.

The makers of the Federal Constitution, the men who drafted it, and those who formulated and enacted the Ordinance of 1787 and the Virginia Acts of Cession, had a clear and well-defined understanding of the meaning of the phrase "republican form of government." It was:

> A government in which the supreme power resides in the whole body of the people and is exercised by representatives elected by them.
>
> Webster's Argument in *Luther v. Borden*, Vol. 6, Webster's Works, 216;
> Chief Justice Fuller, *In re Duncan*, 139 U. S., page 461;
> *Downes v. Bidwell*, 182 U. S. 279.

John Jay defined an American State as understood when he wrote in the Constitution of the State of New York:

"The supreme legislative power within this State shall be vested in two separate and distinct bodies * * * who together shall form the Legislature * * *."

5 Thorpe, 2623.

The whole people cannot be the Executive, nor the Supreme Court, nor the Legislature in a republican State.

A distinct republican state government means now what it meant to the Legislature of Virginia and the people of the United States in 1783, when the cession was made to, and accepted by, the United States; when the Ordinance of 1787 was made; when the Federal Constitution was adopted, and when the Enabling Act of 1816 was passed; followed by the ordinance of this State.

Virginia Act of Cession, R. S. 1843, pages 16, 18;
Deed, Dillon's Colonial Legislation, page 357;
Ordinance of July 13, 1787, R. S. 1843, page 20;
Indiana Enabling Act, April 19, 1816, R. S. 1843, page 33;
Ordinance of Indiana, June 29, 1816, R. S. 1843, page 37;
Ohio Enabling Act, April 30, 1802;
Illinois Enabling Act, April 18, 1818.

"The meaning of (every) constitution (and ordinance and statute) is fixedwhen it is adopted, and it is not different at any subsequent time, when a court has occasion to pass upon it." It always means "the intent of the people in adopting it."

Cooley's Constitutional Limitations, 7th Ed., page 89, *et seq.*, and notes.

James Madison said it was:

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and

we shall comprehend both the nature of the cure and efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are, first, the delegation of the government in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose.

* * * * * * * * * * * * * *

The true distinction between these forms (Republic and Democracy) was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, must be confined to a small spot; a republic may be extended over a large region.

James Madison—Article 10 in the Federalist.

Daniel Webster believed it to be:

A Government in which the supreme power resides in the whole body of the people and is exercised by representatives elected by them.

Webster's Argument in *Luther v. Borden*, Vol. 6 Webster's Works, 216;

Chief Justice Fuller, In re Duncan, 139 U. S. 461;

Downes v. Bidwell, 182 U. S. 279.

A distinct republican state government must be one which is agreeable to the legislature of Virginia and the people of the United States in [illegible], when the oath was made and accepted by the United States; when the ordinance of [illegible] was made; when the Federal Constitution was adopted; when the Enabling Act of [illegible] was passed; when Watson spoke in the case in *Luther v. Borden*, supra; when it meant when ohio framed and adopted a constitution vesting all legislative power in a General Assembly composed of two bodies, House and Senate.

In each and every one of the cases above mentioned a republican state means a government with a legislative department consisting of representatives elected by the people in which, under the constitution, are vested the supreme legislative powers of the state.

1. Virginia Constitution, [illegible], 6 Thorpe 3813 at seq.;
2. New York Constitution, [illegible], 5 Thorpe 2627 at seq.;
3. North Carolina Constitution, [illegible], 5 Thorpe 2795, at seq.;
4. Massachusetts Constitution, [illegible], 3 Thorpe 1889 at seq.;
5. New Hampshire Constitution, [illegible], 4 Thorpe 2455, at seq.;
6. South Carolina Constitution, [illegible], 6 Thorpe 3245, at seq.;
7. Georgia Constitution, [illegible], 2 Thorpe 781 at seq.;
8. Delaware Constitution, [illegible], 1 Thorpe 561 at seq.;
9. Pennsylvania Constitution, [illegible], 5 Thorpe 3083, at seq.;
10. New Jersey Constitution, [illegible], 5 Thorpe 2591, at seq.;
11. Maryland Constitution, [illegible], 3 Thorpe 1687 at seq.

> The charters of Connecticut, 1 Thorpe 529, and Rhode Island, 6 Thorpe, 3211, gave the same form of government, and by common consent remained their constitutions until 1818 and 1842.

The incorporation of provisions for the initiative and referendum into the Ohio Constitution imposed the republican form of government in the state of Ohio and transformed the state from "a distinct republican state" into a quasi democracy where laws are made and enacted not by representative legislative authority, but by the people in mass.

Such a government is not "a distinct republican state" within the meaning and true intent of the term. Provisions and Ordinances above mentioned and established and maintained in Ohio for more than a hundred years.

While still retaining a clause vesting the exclusive legislative power in a general assembly consisting of a Senate and House of Representatives, the state has added to that provision the following:

(Section 1, Article II, Constitution of Ohio, Page 8 Throp Ohio General Code, Volume 1, Page 100.)

Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section or item of any law passed by the general assembly appropriating money, except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution

and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws. (As amended September 28th, 1911).

Section 1a. The first aforesaid power reserved by the people is designated the initiative and the signatures of ten percentum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the Secretary of State, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the Secretary of State shall submit for the approval or rejection of the electors, the proposed amendment, in the manner here-inafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution proposed by initiative petition to be submitted directly to the electors." (Adopted September 8, 1912.)

Both the initiative and referendum are in addition to the forms of representative form of government. Expressions by the people directly in the principles upon which the republic is founded. Direct legislation is democracy, as opposed to that form of government with which these powers conflict which is more in the form and which is not to be used to undermine.

State legislatures with power unimpaired are a vital feature of our government; the Federal Constitution presupposes their existence and imposes upon each state the obligation to maintain them. The division of powers of the three departments in each of the states is a prerequisite to the national government.

State legislatures are under the Constitution the agency to carry on the relations between the state and the nation.

The word "legislature" in the Constitution means a representative assembly consisting of two houses empowered to make the law. Such was its meaning at the time of the adoption of the Constitution and such must be its meaning now.

For these reasons the referendum provisions in the constitution of Ohio are illegal and void and the referendum election proposed to be held under them on the action of the legislature in ratifying the pending amendment to the Constitution is without warrant of law and should be enjoined.

For the reasons set forth and cited in the foregoing brief of argument, the plaintiff in error prays the judgment of the Court below may be reversed.

And he now abides the judgment of this Honorable Court.

[illegible]
Indianapolis, Indiana.
[illegible]
Cincinnati, Ohio.
[illegible]
Washington, D. C.,
Counsel for Plaintiff in Error.

[illegible]
Cincinnati, Ohio.
[illegible]
Indianapolis, Indiana.
[illegible]
Indianapolis, Indiana.
[illegible]
Of Counsel.

APPENDIX A

[illegible]

[illegible]

[illegible]

[illegible] *Plaintiff*,

v.

[illegible] *Defendants*.

Petition for writ of Mandamus filed in the [illegible]

[illegible]

The defendant, Thomas L. Fogus, is the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and was such officer during all the times hereinafter set forth.

That the defendants, H. E. Eikenberry, County Auditor aforesaid; Henry T. Hunt, Sheriff aforesaid, and Thomas L. Fogus, Prosecuting Attorney aforesaid, by virtue of having been duly elected to such offices, respectively, and pursuant to Section 3939-1, of the General Code of Ohio, constitute a board known as the Budget Commissioners of Hamilton County, Ohio, and that by virtue thereof, and of the statutes of Ohio further defining their duties and as such Budget Commissioners, they and the said defendants, H. E. Eikenberry, as County Auditor aforesaid, carry out and enforce the provisions of law affecting the state finances, and are charged with the duty of the administration of the statutes, as Auditor aforesaid, which bound to said officer, and the provisions of the state finances, or the collection affecting the interests of the state.

Said relator further says that the General Assembly of the State of Ohio, during the regular session thereof, which, on the eighth day of April, 1913, duly enacted a law entitled "An Act providing a levy and to make a fund for the purposes provided in the act passed May 29, 1913, entitled "An Act to provide a state highway department, defining the duties thereof, and providing and to the construction and maintenance of highways, and to repeal certain sections of the General Code" approved June 9, 1913, and to repeal certain sections of Laws, pages 388, 1913, and for other purposes" which said act was duly approved by the Governor of Ohio on the 10th day of April, 1913, and is in full force and effect.

That by said act of the General Assembly it is provided that for the purposes thereof there shall be levied a tax of one-half of one mill on all the property within the state, to be collected as are other taxes, and that the proceeds thereof shall be paid over by the Treasurer of State, on receiving from the Auditor of State, as

and authorities legally empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law, to forthwith proceed to determine the sums to be levied upon such part and lot of real property, and upon the amount of personal property, moneys and credits listed in said County of Hamilton.

That among the other taxes to be included with said rates is the taxes provided for in said act of the General Assembly amounting to one-half of one mill on all the taxable property therein; that the same is required by law to be included within the annual budget and estimate prepared by the County Auditor, and said budget and estimate shall be laid before the defendants, the Budget Commissioners of Hamilton County, for their examination, and to ascertain the total amount proposed to be raised in said county for taxable purposes, and to perform certain other duties in connection with such budget and estimate as are required by law, and the provisions of which therefore apply to the said defendants.

The relator says, that said defendant, County Auditor aforesaid, laid said estimate before said defendants, the Budget Commissioners of Hamilton County, who considered the same and allowed all sums certified to said Auditor and except the half mill provided by said Act law, and said Budget Commissioners refused to include said mill or any part thereof within said Budget and have ever since refused to include therein or to allow the same or any part thereof.

That said Budget Commissioners have certified to said defendant, County Auditor, the amounts allowed for state and county purposes, without including therein the one-half mill provided by said law.

That the said relator, as Auditor of State, has performed all duties in connection therewith as required by law to be performed by him as such officer, and has so stated and directed said defendants to observe the provisions of said law, and to add to said county budget and estimate the amount of one-half of one mill in addition to all other levies made for any purpose or purposes, as required by said act of the General Assembly, but the said defendants and each of them, as such officers, have refused to observe and obey such instructions,

and have refused to include within said county budget and estimate said amount of one-half of one mill, for the purposes of said act of the General Assembly, and to perform any other duty in connection therewith, the said defendants and each of them alleging as a reason for such refusal that said act is unconstitutional, null and void.

Wherefore, this relator prays that a writ of mandamus may issue against the said defendant, E. E. Edmundson, as County Auditor aforesaid, and against said defendants, E. E. Edmundson, County Auditor; Henry T. Hunt, Mayor, and Thomas L. Pogue, Prosecuting Attorney, as the Budget Commissioners in and for Hamilton County, Ohio, commanding them, and each of them, forthwith to obey the instructions of the relator as Auditor of State aforesaid, and to add to the county budget and estimate of Hamilton County, aforesaid, the amount of one-half of one mill, for the purposes of said act, in addition to all other levies made for any purpose or purposes and to do and perform all other things and direct upon them and each of them in respect to the levying and collection of said tax, as is required by said act of the General Assembly, and for all proper relief.

THOMAS S. HOGAN,
Prosecuting Attorney of Ohio.

APPENDIX B.

Ohio Enabling Act, April 30, 1802.

1 U. S. Statutes at Large, Volume 2, Page 173.

CHAPTER XLI. AN ACT TO ENABLE THE PEOPLE OF THE EASTERN DIVISION OF THE TERRITORY NORTHWEST OF THE RIVER OHIO TO FORM A CONSTITUTION AND STATE GOVERNMENT, AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION, ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT THE INHABITANTS OF THE EASTERN DIVISION OF THE TERRITORY NORTHWEST OF THE RIVER OHIO, BE AND THEY

are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted to the Union, upon the same footing with the original states, in all respects whatever.

* * *

Section 3. And be it further enacted, That the members of the convention, when duly elected, be and they are hereby authorized to meet at Chillicothe on the first Monday in November next; which convention, when met, shall first determine by a majority of the whole number elected, whether it be or be not expedient at that time to form a constitution and state government for the people within the said territory, and if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and state government, or if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame a government, which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance, and shall form for the people of the said state, a constitution and state government; PROVIDED THE SAME SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THE PROVISIONS of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original states and the people and states of the territory north west of the River Ohio.

APPENDIX C.

Indiana Enabling Act, April 19, 1816.

[3 U. S. Statutes at Large, Private & Resolutions, 289.]

CHAPTER XXII. *An Act to enable the people of the Indiana Territory to form a Constitution and State Government, and for the admission of such state into the Union on an equal footing with the original states.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as

enabled, That the inhabitants of the Territory of Indiana be and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever. * * *

Section 4. And be it further enacted, That the members of the convention thus duly elected be and they are hereby authorized to meet at the seat of the government of the said territory, on the second Monday of June, next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not expedient, at that time, to form a constitution and state government, for the people within the said territory, and if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and state government; or if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution, or frame of government; which said representatives shall be chosen in such manner and in such proportions, and shall meet at such time and place, as shall be prescribed by said ordinance, and shall then form, for the people of said territory, a constitution and state government, PROVIDED, THAT THE SAME WHEREVER FORMED, SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THESE ARTICLES OF THE ORDINANCE of the 13th of July, one thousand seven hundred and eighty-seven; which are declared irrevocable between the original states and the people and states of the territory Northwest of the River Ohio; excepting so much of said articles as relate to the boundaries of the States therein to be formed."

APPENDIX B.

Illinois Enabling Act, April 18, 1818.

U. S. Statutes at Large, Volume 3, Page 428.

[illegible] LAWS. An Act to enable the people of the Illinois Territory to form a Constitution and State Gov-

ment, and for the admission of such state into the Union on an equal footing with the original states.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the Territory of Illinois be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever. * * *

Section 4. And be it further enacted, That the members of the convention, thus duly elected, be, and they are hereby, authorized to meet at the seat of the government of the said territory, on the first Monday of the month of August next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not, expedient at that time to form a constitution and state government for the people within the said territory, and, if it be expedient, the convention shall be and hereby is authorized to form a constitution and state government, or, if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance, and shall then form for the people of said territory, a constitution and state government: PROVIDED, THAT THE SAME, WHENEVER FORMED, SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THE ORDINANCE of the thirteenth of July, seventeen hundred and eighty-seven, between the original states and the people and states of the territory northwest of the River Ohio, excepting so much of said articles as relate to the boundaries of the states therein to be formed. And Provided also, That it shall appear, from the communication directed to be made by the legislature of the said territory, that there are, within the proposed state, not less than forty thousand inhabitants

HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, *v.* KENTUCKY DISTILLERIES & WAREHOUSE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

DRYFOOS ET AL. *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 589, 602. Argued November 20, 1919.—Decided December 15, 1919.

The power to prohibit the liquor traffic as a means of increasing war efficiency is part of the war power of Congress, and its exercise without providing for compensation is no more limited by the Fifth Amendment than a like exercise of a State's police power would be limited by the Fourteenth Amendment. P. 154.

The War-Time Prohibition Act, approved ten days after the armistice with Germany was signed, Act of November 21, 1918, c. 212, 40 Stat. 1046, provided: "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export." *Held*, in respect of liquors in bond, even if belonging to one who made and owned them before the

act was passed and paid revenue taxes upon them since June 30, 1919:

(1) That the act was not an appropriation of such liquors for public purposes. P. 157.

(2) That the time allowed for disposing of all liquors in bond on November 21, 1918, could not be declared unreasonable, as a matter of law, even if they were not sufficiently ripened or aged to be disposed of advantageously during the period limited. P. 158.

(3) That the prohibition was not in violation of the Fifth Amendment as a taking of property without compensation. P. 157.

(4) That it was within the war power when passed (notwithstanding the cessation of hostilities under the armistice), as a means of war efficiency and for the support and care of the Army and Navy during demobilization. P. 158.

A wide latitude of discretion must be accorded to Congress in the exercise of the war powers. P. 163.

The court cannot inquire into the motives of Congress, in determining the validity of its acts, or into the wisdom of the legislation; nor pass upon the necessity for the exercise of a power possessed. P. 161.

It is settled that the war power carries with it the power to guard against immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. *Id.*

Assuming that the continuing validity of an act passed under the war power may depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or by a proclamation of peace, but upon some actual war emergency or necessity, the court cannot say that the necessity for the prohibition had ceased when these suits were begun, in view of the facts that the treaty of peace has not been concluded, that various war activities,—among them national control of railroads,—continue, and that the man power of the nation has not been completely restored to a peace footing. P. 161.

The Eighteenth Amendment did not operate to repeal the War-Time Prohibition Act. P. 163.

In defining the period of the prohibition, Congress in the War-Time Prohibition Act, doubtless expecting that the war would be definitely ended by a peace under a ratified treaty or a proclamation before demobilization was complete, intended that the prohibition should continue until the date of the termination of demobilization had been definitely ascertained by the President and made known by him through a proclamation to that end. P. 164.

The reference to the "demobilization of the army and navy," in the

President's message communicating his veto of the National Prohibition Act, is not the proclamation required by the War-Time Prohibition Act. P. 167.

In an exact sense, demobilization had not terminated then or when these suits were begun, as is shown by the report on the subject of the Secretary of War, made to the President and transmitted to Congress; nor does it appear that it has yet so terminated. P. 168.

No. 589. Reversed.

No. 602. Affirmed.

THE cases are stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Frierson*, with whom *Mr. W. V. Gregory* was on the briefs, for appellant in No. 589 and appellee in No. 602.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for appellee in No. 589:

Congress has no power to prohibit the sale of whisky within a State, except under its war powers. By the Tenth Amendment the States reserved to themselves the police power over the liquor traffic with the right to abolish future manufacture, sale or possession. This power is absolute and exclusive, since, as before, the Fourteenth Amendment. But it is still an open question whether a State can make unlawful the possession, use or sale of liquors lawfully acquired (as in the present case) before the passage of the prohibitory statute. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 459; *Wynehamer* v. *People*, 13 N. Y. 378.

Congress can waive the interstate character of liquor in order to subject it to the laws of a State when once introduced therein, or can prohibit its transportation to a State where its possession is prohibited. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323. But Congress has no power, in peace time, to prohibit the sale of whisky. *In re Rahrer*,

140 U. S. 545, 554; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Matter of Heff*, 197 U. S. 488, 505; *Hammer* v. *Dagenhart*, 247 U. S. 251, 273–276; *Keller* v. *United States*, 213 U. S. 138, 144, 148.

In order to guard and promote the health, welfare and efficiency of the men composing the army and navy, and to increase the efficiency of the workers in the production of arms, munitions, ships, food and clothing for them, Congress has the right temporarily to regulate the sale of liquor, and, if reasonably necessary to accomplish such objects, to forbid its sale. *McKinley* v. *United States*, 249 U. S. 397, 399; *Selective Draft Law Cases*, 245 U. S. 366; *Schenck* v. *United States*, 249 U. S. 47, 52; *Grancourt* v. *United States*, 258 Fed. Rep. 25; *United States* v. *Casey*, 247 Fed. Rep. 362; *Pappens* v. *United States*, 252 Fed. Rep. 55. But the exercise of this power, like all others, is subject to the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2; *Johnson* v. *Jones*, 44 Illinois, 142; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27, 61. It necessarily follows that if, in the exercise of the war power, private property is taken, the owner thereof is entitled to just compensation therefor.

Whisky is property and when taken for public use is entitled to the protection of the Fifth Amendment. *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Wynehamer* v. *People*, 13 N. Y. 378, 383, 384; *Commonwealth* v. *Campbell*, 133 Kentucky, 50; *Barber* v. *Commonwealth*, 182 Kentucky, 200; *Commonwealth* v. *Kentucky Distilleries & Warehouse Co.*, 143 Kentucky, 314.

The War-Time Prohibition Act takes appellee's private property for public use, but makes no provision for just compensation to the owner. Therefore, the act is unconstitutional. The act prohibits appellee from either selling the whisky which it has in its own possession fully tax paid, or obtaining possession of its property which is in

the Government's bonded warehouses. The effect is that the appellee has been deprived of every attribute of ownership, except the necessity of paying taxes to the United States upon the very property which the Government refuses to allow the owner to use or sell. If this does not constitute a taking of a person's property, the English language has lost its meaning. *Buchanan* v. *Warley*, 245 U. S. 60, 74, 81; *Wynehamer* v. *People*, 13 N. Y. 387, 389, 396, 398; *Foster* v. *Scott*, 136 N. Y. 577; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445. The appellee was required by the federal statute to provide, at its own expense, bonded warehouses, which were under the exclusive control of the Government. *Taney* v. *Penn National Bank*, 232 U. S. 174; *Dale* v. *Pattison*, 234 U. S. 399. By statute, it was also authorized to leave its whisky in bond for eight years, and to bottle it in bond at any time after the first four years. The whisky in question was rightfully in appellee's bonded warehouses and it had the right to rely upon the "bottling in bond statute," and furthermore it could not have bottled a large part of the whisky because it had not been in the warehouses four years at the time the War Prohibition Act was enacted. It is therefore no answer to suggest that the appellee should have withdrawn the whisky from bond and sold the same before the War Prohibition Act was enacted. As the taking is solely under the war power, it is concededly for a public use. No provision for any compensation was made; but, on the contrary, Congress (February 24, 1919) imposed a heavy retroactive tax (double the then existing tax) on all whisky, including that already tax-paid; the tax was assessed and collected; and the owners are now prohibited from selling the very whisky on which they have paid that tax, a large part of which the appellee was compelled to pay as late as September 24, 1919. It is a false analogy to say that under the war power Congress is endowed with what are commonly

called the police powers of the States and consequently may exercise them as unlimitedly as do the States. For the police powers of the States are not subject to the Fifth Amendment, whereas the war powers of Congress are. It has not been decided that even the state police powers may prohibit sale of liquor made before the passage of the law. While it is true that Congress' exercise of the war power can accomplish anything which the States can accomplish under their police power, yet the qualifications imposed thereon are different. It may not, for instance, require excessive bail, refuse a public trial in a criminal case, or cause the accused to be a witness against himself. The instances might be multiplied where States are free in the exercise of their police powers, from requirements to which Congress, even in the exercise of its war power, is subject. The law is abundantly settled that while the Fifth Amendment does not require that the just compensation shall be actually paid in advance of the taking, nevertheless, the owner is entitled to some reasonable, certain and adequate provision for obtaining such compensation before his ownership or possession can be interfered with.

The War-Time Prohibition Act has, by its own terms, ceased to be operative. The evil sought to be remedied was the danger of intoxication of soldiers, sailors and war workers during the war and during the subsequent period of demobilization. Cong. Rec., vol. 56, pp. 9627, 9641. Demobilization is the act of disbanding troops; the reduction of military armaments to a peace footing. Century Dictionary; 18 Corpus Juris, 484; Cong. Rec., *loc. cit.*

The President's acts and declarations amount to a proclamation of "the date of the conclusion of the present war," in the sense of actual hostilities, and *thereafter* the "termination of demobilization." [Counsel quoted also statements made by the War Department and by General Pershing, to the effect that demobilization was at an end.]

The demobilization process has continued steadily until the strength of both the army and navy has been reduced to less than the authorized peace quota. The production of war munitions has stopped, all existing contracts have been canceled and the Government is actively disposing of its surplus war supplies of arms, munitions, food and clothing, etc.

What is meant by "conclusion of the present war" must be determined by the purpose of this particular act, and the evident belief of Congress that the ending of the war would precede demobilization. Cases like *Hijo* v. *United States*, 194 U. S. 315, holding war existent until ratification of peace, are inapplicable. That Congress purposely did not intend to make the "conclusion of the present war" dependent upon any treaty of peace is illustrated by a comparison of the language of this act with that of other war legislation wherein the "end of the war" was involved.

A foreign war may not be terminated in respect of various considerations arising under international law and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States, Germany and Austria, notwithstanding the complete demobilization of our army and navy, the constitutional rights of the citizens of the United States are to be tested as if war actually existed. It is not necessary that there should ever be a definite treaty of peace. History presents many instances where there has been a "conclusion of war" without any treaty of peace. Whether or not war has been terminated is, after all, a question of fact to be determined in each case by the situation presented.

The War-time Prohibition Act has become obsolete with the passing of the emergency [citing various rate cases, and the *Perrin* and *Gearlds Case*, which are considered in the court's opinion, *infra*, 162].

Mr. Walter C. Noyes, with whom *Mr. Moses J. Stroock*, *Mr. Arthur L. Strasser* and *Mr. Walter S. Dryfoos* were on the brief, for appellants in No. 602.

Mr. Wayne B. Wheeler and *Mr. R. C. Minton*, by leave of court, filed a brief as *amici curiæ* in No. 589.

Mr. Levi Cooke and *Mr. George R. Benneman*, by leave of court, filed a brief as *amici curiæ* in No. 602.

Mr. Justice Brandeis delivered the opinion of the court.

The armistice with Germany was signed November 11, 1918. Thereafter Congress passed and, on November 21, 1918, the President approved the War-Time Prohibition Act (c. 212, 40 Stat. 1045, 1046), which provides as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. . . ."

On October 10, 1919, the Kentucky Distilleries and Warehouse Company, owner of distillery warehouses and of whisky therein, brought in the District Court of the United States for the Western District of Kentucky a suit against Hamilton, Collector of Internal Revenue for that District, alleging that the above act was void or had become inoperative and praying that he be enjoined from interfering, by reason of that act, with the usual process of

withdrawal, distribution and sale of the whisky in bond. The case was heard before the District Judge on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. A decision without opinion was rendered for the plaintiff; and, the defendant declining to plead further, a final decree was entered granting a permanent injunction in accordance with the prayer of the bill. A similar suit seeking like relief was brought on October 29, 1919, by Dryfoos, Blum & Co., in the District Court of the United States for the Southern District of New York, against Edwards, Collector for that District. That case was heard on November 5 before the District Judge on like motions for a preliminary injunction and to dismiss. An opinion was filed November 14, 1919, holding the act in force; and on the following day a final decree was entered dismissing the bill.

The essential facts in the two cases differ in this: In the Kentucky case the whisky was stored in a distillery warehouse; the plaintiff was the maker of the whisky; had owned it prior to the passage of the act; and had, since June 30, 1919, paid the revenue tax on part of it. In the New York case the liquors were in general and special bonded warehouses; the plaintiffs were jobbers; and it does not appear when they became the owners of the liquors. Both cases come here by direct appeal under § 238 of the Judicial Code, were argued on the same day, and may be disposed of together. Four contentions are made in support of the relief prayed for: (1) that the act was void when enacted because it violated the Fifth Amendment; (2) that it became void before these suits were brought by reason of the passing of the war emergency; (3) that it was abrogated or repealed by the Eighteenth Amendment; (4) that by its own terms it expired before the commencement of these suits. These contentions will be considered in their order.

First: Is the act void because it takes private property

for public purposes without compensation in violation of the Fifth Amendment? The contention is this: The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power "to make all laws which shall be necessary and proper for carrying into execution" the war powers expressly granted. Article I, § 8, clause 18. Congress might under this implied power temporarily regulate the sale of liquor and, if reasonably necessary, forbid its sale in order to guard and promote the efficiency of the men composing the army and the navy and of the workers engaged in supplying them with arms, munitions, transportation and supplies. *McKinley* v. *United States*, 249 U. S. 397, 399. But the exercise of the war powers is (except in respect to property destroyed by military operations, *United States* v. *Pacific Railroad*, 120 U. S. 227, 239) subject to the Fifth Amendment. *United States* v. *Russell*, 13 Wall. 623, 627. The severe restriction imposed by the act upon the disposition of liquors amounts to a taking of property; and being uncompensated would, at least as applied to liquors acquired before the passage of the act, exceed even the restriction held to be admissible under the broad police powers possessed by the States. Therefore, since it fails to make provision for compensation, which in every other instance Congress made when authorizing the taking or use of property for war purposes,[1] it is void. Such is the argument of the plaintiffs below.

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[1] War Acts authorizing the seizure or requisition of property:

March 4, 1917, c. 180, 39 Stat. 1168, 1193, July 1, 1918, c. 113, 40 Stat. 634, 651, factories, ships, and war materials; June 15, 1917, c. 29, 40 Stat. 182, 183, April 22, 1918, c. 62, 40 Stat. 535, November 4, 1918, c. 201, 40 Stat. 1020, street railroads, equipment, etc., and the acquisition of title to lands, plants, etc.; August 10, 1917, c. 53, 40 Stat. 276, 279 (Food Control Act), foods, fuels, factories, packing